

CHAPTER 5

PHYSICAL OR MENTAL DISABILITY OR MEDICAL CONDITION

LEGAL STANDARDS FOR PHYSICAL OR MENTAL DISABILITY OR MEDICAL CONDITION

A. Introduction/Overview

DFEH accepts complaints in which the aggrieved person (complainant) asserts that the respondent took an adverse action against him/her (for example, refused to hire him/her, terminated his/her employment, etc.) because of the complainant's actual or perceived mental or physical disability, or medical condition. Such cases may involve allegations of differential treatment, harassment (see Chapter dealing with harassment), denial of reasonable accommodation, and/or a failure to take all reasonable steps to prevent discrimination and/or harassment from occurring.

One type of case seen frequently involves a respondent's refusal to hire a complainant because of the complainant's actual or perceived disability. The respondent typically asserts that the adverse action it took toward the employee or job applicant is excused by a legally permissible affirmative defense. For example, the respondent may assert that the complainant's disability prevents him/her from safely performing the job functions without posing a danger to him/herself or others *and* no reasonable accommodation exists which will alleviate the alleged danger. In such cases, since the respondent usually admits the "causal connection" between the disability and the adverse action, the key investigative question becomes whether the respondent can present sufficient evidence to allow it to assert the affirmative defense and escape liability for having taken the adverse action.

1. Jurisdiction

The alleged discrimination or harassment must have been perpetrated by an "employer," as that term is defined in Government Code section 12926, subdivision (d):

"Employer" includes any person¹ regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.²

¹ "Person" includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Government Code section 12925 (Gov. Code, §), subdivision (subd.) (d).)

² See DFEH Enforcement Division Directive 213, Complaints against Religious, Non-Profit Organizations.

If the complainant alleges that he/she has been subjected to unlawful harassment because of his/her physical or mental disability or medical condition, it is necessary, in order for DFEH to have jurisdiction over the complaint, to establish that there existed an employment relationship. In the case of harassment, it is sufficient to establish that the person or entity had one or more employees.³

For additional factors relevant to a determination of whether or not DFEH has jurisdiction over the complaint, see Chapter entitled "Jurisdiction."

2. Elements of the Prima Facie Case of Discrimination

Disability cases use the same basic "issue framework" employed in other cases arising under the Fair Employment and Housing Act (FEHA). The FEHA and cases interpreting it have articulated the following prima facie elements for establishing that discrimination because of a complainant's actual or perceived disability or medical condition occurred:

- a. The complainant is a person with a physical or mental disability or medical condition as those terms are defined in Government Code section 12926, subdivisions (h), (i), and (k).
- b. The complainant was qualified for the position he/she sought or held, meaning that he/she was able to perform the essential functions of the job with or without reasonable accommodation.
- c. The respondent denied the complainant an employment opportunity, i.e., took an "adverse action" against the complainant by refusing to hire him/her, terminating his/her employment, etc.⁴ And
- d. A "causal connection" exists between the complainant's disability or perceived disability and the denial of an employment opportunity. In other words, the decision was based, at least in part, on the complainant's disability, perceived disability or medical condition.⁵

³ Gov. Code, § 12940, subd. (j)(4)(a).

⁴ An adverse employment action can be demonstrated through the introduction of direct evidence or by inference. For instance, when a complainant alleges that he/she was not hired because of his/her disability, the respondent's discriminatory motive can be shown by establishing that the complainant was the most qualified for the position, but a person who did not have a disability was hired instead or that the position remained open and the respondent continued soliciting applications from persons who did not have a disability and matched or did not exceed the complainant's qualifications. (See discussion in *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.)

⁵ *Green v. State of California* (2007) 42 Cal.4th 254.

The evidence need not show that the complainant's disability or medical condition was the *sole* or even dominant motivation for the adverse action. Rather, discrimination is established if a preponderance of the evidence indicates that the complainant's disability or medical condition was at least *one* of the factors that motivated the employer's action.⁶

3. Affirmative Defenses

The respondent may legally excuse its discriminatory actions if it can prove the existence and applicability of at least one of the affirmative defenses that may be recognized under the FEHA. The respondent bears the burden of producing sufficient evidence to demonstrate the applicability of the defense.⁷

4. Remedies

The complainant is entitled to “make whole” remedies if a preponderance of the evidence establishes that the complainant was denied an employment opportunity because of his/her disability or medical condition *and* no affirmative defense excuses the employer's action. He/she is also entitled to recoup compensatory damages for emotional distress and physical harm suffered as a result of the respondent's conduct. (See complete discussion in Chapter entitled “Remedies.”)

B. Overview of FEHA's Disability Provisions

1. Evolution of FEHA's Disability Provisions

The disability provisions of the FEHA can be divided into three time periods: The first, 1973⁸ to 1992, interpreted the pre-1993 “physical handicap” provisions. The second, 1993 to 2000, interpreted the post-1993 physical and mental disability provisions that partially incorporated the concepts set forth in the federal Americans with Disability Act (ADA).

The third, 2000 to the present, may be described primarily as an era of clarification and broadening of the protections afforded under the FEHA to

⁶ *DFEH v. Seaway Semiconductor, Inc.* (2000) FEHC Dec. No. 00-03 at p. 11; *DFEH v. General Dynamics, Inc.* (1990) FEHC Dec. No. 90-06, at p. 8; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290; *DFEH v. Raytheon Company* (1989) FEHC Dec. No. 89-09, at pp. 15-16, *decision affd.*, *Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242.

⁷ *Albertson's v. Fair Employment and Housing Commission* (2006) 2006 WL 147528, citing *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 359-363; see also California Code of Regulations, title 2, section 7293.8 (Cal. Code Regs., §).

⁸ In 1973, Labor Code section 1420, the predecessor to Government Code section 12940, was amended to add “physical handicap” to the statute's list of discriminatory bases.

persons with disabilities. That is because the FEHA underwent substantial revision during California's 1992 Legislative Session and again in 2000.

During the period of 1973 to 1992, the Fair Employment Practices Act (FEPA) and its successor, the FEHA, prohibited "physical handicap" discrimination. Effective January 1, 1993, the word "handicap" was replaced with "disability" and the FEHA was amended to include both physical and mental disabilities. Alcoholism and drug addiction, formerly excluded from coverage under the FEHA, were incorporated into its definition of disability.⁹ These changes, among others, were prompted by the 1990 passage of ADA¹⁰ and the desire of the California Legislature to make the FEHA's disability provisions as comprehensive as those contained in ADA.¹¹

The 1992 statutory changes required revisions to the Fair Employment and Housing Commission's (FEHC) Regulations, issued originally in 1980. The sections pertaining to disability law were revised in 1995 to conform to the 1992 statutory amendments.¹²

On January 1, 2001, the Prudence K. Poppink Act (Poppink Act) (former Assembly Bill (AB) 2222) became law [Stats. 2000, ch. 1049]. AB 2222 was drafted by then-Assembly member Sheila Kuehl. About the Bill, she wrote, in pertinent part:

AB 2222 is about equal opportunity. It's about making sure that no Californians are denied the opportunity to prove themselves at jobs they are capable of doing just because of assumptions made on the basis of their medical history. When employers provide reasonable accommodation for their disabled employees, they are not only strengthening our economy by keeping people working who would otherwise require public assistance, they are also availing themselves of a valuable labor pool of experienced, skilled employees. Any of us can incur a disabling injury or disease at any time. By protecting the dignity and self-reliance of the disabled, this bill protects all of us.¹³

⁹ The FEHA does not explicitly state that alcoholism and prior drug addiction constitute disabilities. However, these conditions qualify as disabilities through incorporation of ADA's definition of disability. The FEHA, at Government Code section 12926, subdivision (I), states that ADA's definition of physical or mental disability or medical condition is to be applied whenever doing so would result in broader protection or coverage than would the FEHA's definitions. Since alcoholism and prior drug addiction may qualify as disabilities under ADA (42 U.S.C. § 12114 (a) and (b)), they are incorporated by reference into the FEHA.

¹⁰ 42 U.S.C. §§ 12101-12213.

¹¹ Section 1 of Stats. 1991, c. 462 (AB 77) (1992).

¹² Cal. Code Regs., tit. 2, §§ 1293.5 - 1294.2.

¹³ Bill Analysis, Assembly Floor, September 7, 2000.

AB 2222 made extensive revisions to the FEHA and codified clarifications of that statute's provisions relating to disability discrimination, including the following:

- a. Placed statutory restrictions upon an employer's ability to require medical or psychological testing or make disability-related inquiries throughout the application and employment process.
- b. Requires employers, upon receipt of a request for reasonable accommodation by an employee or job applicant with a disability, to engage in a timely, good faith, interactive process to determine effective reasonable accommodation(s).
- c. Clarified that California does not take into account mitigating measures when determining whether an individual has a physical or mental disability.
- d. Clarified that, in California, a *limitation*, rather than a "substantial" limitation of a major life activity is required in order to establish that an individual has a physical or mental disability.
- e. Included in the definitions of physical or mental disability the individual's record or history of having the disability in question.
- f. Incorporated the revised definitions of physical and mental disability into Civil Code sections 51, 51.5, and 54 prohibiting discrimination in public accommodations, business transactions, access to public places and employment in the State Civil Service System, and Government Code section 12955.3 prohibiting discrimination in housing.
- g. Revised the definition of "medical condition."
- h. Clarified that "working" is a "major life activity," regardless of whether the actual or perceived work limitation implicates a single job or a broad class of jobs.
- i. Clarified California's Legislative intent, declaring that California law "has always, even prior to the passage of the federal act," provided broader protections for persons with disabilities than ADA.

Note: Prior to citing and/or relying on any pre-2000 FEHC decision or court case, DFEH staff must always consider whether statutory and regulatory changes and/or clarifications have affected the applicability of a particular case.

2. Evolution of the Elements of the Prima Facie Case

California Supreme Court's August 2007 decision in *Green v. State of California* injected a new element into the prima facie case.¹⁴ Prior to that time, the FEHC and appellate courts had not uniformly required that DFEH establish, as a distinct element of the prima facie showing, that he/she was qualified for the job or position at issue in the case. However, the Court interpreted the FEHA consistent with ADA on this point.

Example: The complainant, a stationary engineer, maintained and repaired equipment and mechanical systems in a correctional facility for approximately 16 years prior to being diagnosed with hepatitis C. His physician did not impose any work restrictions until seven years later when the complainant began receiving Infergen injections three times per week. The complainant experienced fatigue, insomnia, headaches and body aches as a result of the treatment, prompting the doctor to request that he be placed on light duty for three to four months. Initially, the employer accommodated complainant's condition by allowing him to report for work late on the days he received injections and assigning him to positions that did not require heavy labor. This continued for a period of almost two years when the complainant was reprimanded for tardiness. (It is unclear whether the complainant continued to be accommodated in this fashion.)

However, about five months later, he sustained an on-the-job injury and was placed on light duty. Eventually, he was placed on disability leave by the employer in accordance with its policy of offering light duty only for limited periods. Some months later, the complainant returned to full duty, but the employer's back to work coordinator noted that complainant had never been released by his physician in relationship to his Infergen treatment for hepatitis C. That same day, the complainant complained of fatigue and requested that he be allowed to see a doctor. At that point, the complainant was advised that the prior restriction to light duty remained in effect. Thus, he would not be allowed to resume work until he was "cleared for full duty."

The complainant alleged that he was subjected to discrimination because of a physical disability.

¹⁴ See, e.g., *Albertson's v. Fair Employment and Housing Commission* (2006) 2006 WL 147528 at pg. 4, citing *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44. [Note: The case is an unpublished decision, the holding of which, at least as to this issue, was abrogated by *Green*. It may not be cited as persuasive authority before any administrative tribunal or court. It is discussed here solely to illustrate the manner in which the elements of the prima facie case were formulated prior to the *Green* ruling.]

The California Supreme Court held that, as part of the prima facie case, DFEH “bears the burden of proving [the complainant] was able to do the job, with or without reasonable accommodation.” In other words, just as under the federal statutory framework, DFEH must demonstrate that the complainant “is a qualified individual under the FEHA (i.e., that he/she can perform the essential functions of the job with or without reasonable accommodation).”

The Court found that the FEHA excludes from its protections “those persons who are not qualified, even with reasonable accommodation, to perform essential job functions.”¹⁵ Unlawful discrimination occurs only if a complainant with a disability is subjected to an adverse employment action when the disability would not prevent him/her from performing the essential functions of the position even though he/she might need reasonable accommodation to do so. Accordingly, the Court reasoned, it is “reasonable to require” DFEH to prove that the complainant could perform the essential functions of the position in question.

The Court was not persuaded by the Legislature’s declaration that California law has always provided broader protections than the federal statutory scheme, concluding that, as to this element of the prima facie case, the operative language of ADA was deliberately incorporated into the FEHA by this State’s lawmakers. The Court felt it would “defy logic and establish a poor public policy in employment matters” to impose liability on an employer if it could be found liable for denying an employment opportunity to an individual who could not perform the essential functions of the position with or without reasonable accommodation.

Thus, the Court held that DFEH “must demonstrate that [the complainant] was qualified for the position sought or held in the sense that he/she is able to perform the essential duties of the position with or without reasonable accommodation.”¹⁶

¹⁵ *Green v. State of California* (2007) 42 Cal.4th 254, 262. [“This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability . . . where the employee, because of his/her physical or mental disability, is unable to perform his/her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his/her health or safety or the health or safety of others even with reasonable accommodations.” (Gov. Code, § 12940, subd. (a)(1).)]

¹⁶ *Green v. State of California* (2007) 42 Cal.4th 254, 267. (See discussion of dissenting opinion below.)

3. Relationship Between the FEHA and ADA

a. Historical Perspective: Prior Incorporation of Selected Provisions of ADA

Although the physical handicap provisions of the FEHA preceded the implementation of ADA by approximately 20 years,¹⁷ ADA, when enacted, provided protection to persons with disabilities not previously included in the FEHA. For example, in addition to the coverage of mental disabilities, alcoholism and prior drug addiction, ADA prohibited pre-offer medical exams and any pre-offer disability-related questions.¹⁸

In 1992, recognizing the broader protections offered by some aspects of ADA, the California Legislature acted to incorporate those provisions into the FEHA via AB 1077:

It is the intent of the Legislature, in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101-336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.¹⁹

AB 1077 helped clarify the relationship between the FEHA and ADA which existed at that time. Effective January 1, 1993, the FEHA was amended to provide *at least* as much protection as ADA, while simultaneously retaining those aspects of the FEHA that offered greater protections than ADA. The intent to incorporate more protective provisions of ADA was articulated in Government Code section 12926, subdivision (l), expressly stating that the FEHA incorporated any ADA definition of disability that would result in greater protection of people with disabilities.²⁰

In 2000, AB 2222 left Government Code section 12926, subdivision (l), intact while revising the actual definitions of physical and mental disability and medical condition. It also added Government Code section 12926.1 which reiterates the Legislature's intent to distance California

¹⁷ Passed in 1990, ADA became effective on July 26, 1992.

¹⁸ Section 102 of ADA, 42 U.S.C. § 12112.

¹⁹ Section 1 of Stats. 1991, c. 462 (AB 77) (1992).

²⁰ Gov. Code, § 12926, subd. (l), states: ". . . [I]f the definition of 'disability' used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental or physical disability, . . . or would include any medical condition not included within those definitions, then the broader protection or coverage shall be deemed incorporated by reference into, and, shall prevail over conflicting provisions of, [the FEHA]."

law from the federal system: “[T]his State’s law has always, even prior to passage of the federal act, afforded additional protections.”

Moreover, as pointed out above, the Legislature emphasized that, in order to be protected under the FEHA, a person with a disability need only experience a *limitation* upon a life activity, rather than a substantial limitation, as is required under federal law, and that the distinction “is intended to result in broader coverage under the law of this State than under that federal act.”

b. Preemption

ADA will only preempt the FEHA if the FEHA provides less protection, as clarified in ADA:

Nothing in this Act shall be construed to invalidate or limit remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protections for the rights of individuals with disabilities than afforded by this Act.²¹

c. FEHA Controls in California

Because the FEHA provides broader protections against disability discrimination than ADA, the FEHA is the controlling law in California.

4. Conclusion

Even when analyzing a case in which the FEHA clearly provides greater protection than ADA, reference to ADA's implementing regulations²² and the Equal Employment Opportunity Commission's (EEOC) written guidelines²³ may be useful when the provisions of the FEHA and/or interpretive case law are unclear or undecided, or the facts of the particular complaint are similar to those discussed in federal publications or case law. However, the legal principles enunciated in those documents merely provide a “floor” by which FEHA enforcement may be measured and compared or analogized.²⁴

²¹ 42 U.S.C. § 12201.

²² Equal Employment Opportunity Commission (EEOC), 29 C.F.R. Part 1630, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, http://www.access.gpo.gov/nara/cfr/waisidx_03/29cfr1630_03.html.

²³ EEOC, A Technical Assistance Manual on the Employment Provision (Title 1) of the Americans with Disabilities Act (1992) (T.A.M.); EEOC, ADA Technical Assistance Manual Addendum (2002) (T.A.M. *Addendum*).

²⁴ The FEHA “. . . shall be construed liberally for the accomplishment of the purposes thereof.” (Gov. Code, § 12993, subd. (a).)

C. Definitions Set Forth in the FEHA

Whether an individual has an actual or perceived disability is *the threshold question* which must be answered when a complainant alleges that he/she has been subjected to unlawful conduct because of his/her disability or medical condition. Thus, when analyzing such cases, DFEH staff must understand and apply the *definitions* set forth in the FEHA for the purpose of determining whether or not the complainant is a person with a disability or medical condition subject to the FEHA's protections.

1. Physical Disability²⁵

"Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

²⁵ Gov. Code, § 12926, subd. (k).

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

a. Qualified Individual with a Disability

As discussed above, the California Supreme Court ruled that the FEHA's protections extend to complainants who are "qualified" for the position in question, "just as the federal ADA requires."

Under ADA, a "qualified" individual "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."²⁶

Federal law employs a two-step qualification test:

- 1) A determination of whether the individual meets the necessary prerequisites for the job, such as educational level, work experience, training, skills, licensure, certification or other job-related characteristics such as punctuality, judgment, the ability to work well with others, etc.

If the individual meets all requirements except for those that he/she cannot fulfill because he/she is a person with a disability, the employer bears the burden to demonstrate that the requirement(s) in question is "job related and consistent with business necessity." See section entitled "Business Necessity" below.

- 2) The essential functions of the job must be identified and an assessment made as to whether the individual with a disability can perform those functions with or without reasonable accommodation.²⁷ See complete discussion of the interactive process and obligation to provide reasonable accommodation below.

²⁶ *T.A.M.*, 1992, at p. II-2.3.

²⁷ *Id.*

b. Exclusions from the Definition of “Physical Disability”

The FEHA’s definition of “physical disability” does not include “sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.” It also does not include being overweight if the weight is unrelated to a physiological, systemic disorder, disease, condition, cosmetic disfigurement or anatomical loss.²⁸

Example: A model on a television game show was terminated from her employment. Her employer’s reasoning was that she had gained weight and was too fat to continue modeling swimsuits.

The model argued that she was subjected to unlawful employment discrimination because of a physical disability. She acknowledged that she had gained weight, but the undisputed evidence showed that she was taking a prescribed medication to control a hormonal imbalance caused by a hysterectomy. She claimed that the medication for the underlying condition caused her to experience the weight gain and asked for a reasonable accommodation – an opportunity to lose the weight during the customary annual hiatus in the show’s videotaping schedule. The model contended that she had been badgered about her weight by the game show’s on-air host who told her to “do whatever it takes [to] lose the weight.” Another representative of the model’s employer told her he wanted to discuss her “weight problem” with her, while yet another admitted calling her “the Pillsbury dough girl.” Her on-air time was reduced and she was filmed hidden behind props. Eventually, the on-air host told her that “this weight problem is going to be a problem for you the entire time you’re on . . .” the show and offered her a retirement package. Her employment was terminated when she refused to retire.

The appellate court reversed the trial court’s grant of summary judgment in favor of the employer, sending the case back to the trial court for a determination of whether or not the model’s weight gain was related to a physiological disorder or condition affecting her reproductive system. If the weight gain was so related, the first prong of the test for a physical disability under the FEHA would be satisfied. If the model could also demonstrate to the trial court that she was limited in one or more major life activities, she would be deemed a person with a disability under the FEHA, subject to its protections. Alternatively, the model was entitled to an opportunity to establish that her employer perceived or “regarded” her as a

²⁸ Cassista v. Community Foods, Inc. (1993) 5 Cal.4th 1050.

person with a disability and took an adverse employment action against her on that basis.²⁹

Example: *When the complainant commenced employment as a dock worker loading, unloading and arranging freight, he weighed approximately 345 pounds. Over the course of the next five years, his weight fluctuated between 340 and 450 pounds, but the complainant admitted that he knew of no physiological or psychological cause for his weight. After he sustained an on-the-job injury, he took a nearly six-month leave. His employer required employees who took leave exceeding 180 days to provide a release from their physician and undergo a physical examination before resuming work. The examining physician noted that the complainant had limited range of motion, was short of breath after a few steps and, “[o]n physical examination, the most notable item is that the patient weighs 405 lbs.” When the examiner opined that the complainant could not safely perform the essential functions of his position, his employment was terminated.*

The complainant contended that his employment was terminated because of his morbid obesity. He argued that the federal definition of disability should be either weight caused by an underlying physiological condition or morbid obesity defined as “body weight more than 100% over the norm” irrespective of the cause. Therefore, under that definition, morbid obesity would qualify as a “condition” bringing the complainant within the statutory definition of “disability” (or “impairment” under the federal statute).

The court rejected his argument, reaffirming that “obesity, except in special cases where the obesity relates to a physiological disorder, is not a ‘physical impairment’ within the meaning of [federal law].” Even morbid obesity must be the result of a physiological condition.³⁰

2. Mental Disability³¹

"Mental disability" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

²⁹ *Hallstrom v. Barker* (2004) 2004 WL 2006162. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

³⁰ *E.E.O.C. v. Watkins Motor Lines, Inc.* (6th Cir. 2006) 463 F.3d 436.

³¹ Gov. Code, § 12926, subd. (i).

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2). . .

The definition encompasses a *broad range* of mental conditions because of the verbiage employed: "*any* mental or psychological disorder..." Thus, included within the meaning of "emotional or mental illness" are, for example, major depression, bipolar disorder, schizophrenia, personality disorders, and anxiety disorders. Anxiety disorders include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorders.³² The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, commonly referred to as the "DSM-IV," is useful for identifying mental conditions or disorders and is recognized as an important reference by the courts.³³

³² EEOC, Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities, EEOC Compliance Manual, No. 915.002, 3-25-97, and Addendum thereto, p. 4. (<http://www.eeoc.gov/policy/docs/psych.html>)

³³ *Ibid.*

As when determining whether or not a physical disability exists, the definition of mental disability does not take into account mitigating measures such as medications, assistive devices, or reasonable accommodations.³⁴

As of this writing, there are still few published decisions offering insight into the analysis of a claim of discrimination because of mental disability.³⁵ Most cases address the claim that an employer/prospective employer failed to provide a reasonable accommodation for an employee/job applicant with a disability.

a. Exclusions from the Definition of “Mental Disability”

Personality traits or certain kinds of behavior are not, in and of themselves, mental disabilities. Irritability, chronic lateness, or poor judgment, by themselves, do not meet the statutory definition of a mental disability although they may be linked to the existence of a mental disability. The same is true of stress. In and of itself, stress is not a mental disability, but it may be *related to* a mental or physical disability.³⁶

As noted above, the second paragraph of Government Code section 12926, subdivision (i)(5), specifically exempts from the definition of mental disability “sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.”

The FEHC Regulations³⁷ state:

- (b) “Disability” does not include:
 - (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
 - (2) Compulsive gambling, kleptomania, or pyromania; or
 - (3) Psychoactive substance use disorders resulting from current illegal use of drugs.

³⁴ Gov. Code, § 12926, subd. (i)(1)(A).

³⁵ The complainant/plaintiff must demonstrate that he/she is a member of a protected class, i.e., a person with a disability, able to perform the position in question with or without a reasonable accommodation, who was subjected to an adverse employment action or denied employment because of the disability. An employer who has no knowledge of an employee or job applicant’s disability cannot be found to have violated Government Code section 12940, subdivision (a), i.e., the adverse employment action or denial of employment could not have been because of a disability about which the employer had no knowledge. (See *Brundage v. Hahn* (1997) 57 Cal.App. 4th 228.)

³⁶ EEOC Compliance Manual, No. 915.002 (3-25-97) p. 4.

³⁷ Cal. Code Regs., tit. 2, § 7293.6, subd. (b)-(d).

- (c) Homosexuality and bisexuality are not impairments and as such are not disabilities.
- (d) The unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability or a mental disability.

For purposes of the exception related to the unlawful use of drugs, the term "drug" refers to a controlled substance as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. § 812).³⁸ "[I]llegal use of drugs" means "the use of drugs the possession or distribution of which is unlawful . . ." However, "[t]his term does not include the use of a drug taken under the supervision of a licensed health care professional or other uses authorized . . ." by law.³⁹ This includes experimental drugs used by persons with AIDS, epilepsy, or mental illness.⁴⁰

Examples.⁴¹

- *A person who uses morphine to control the pain caused by cancer is not using a drug illegally if he/she is doing so under the supervision of a physician.*
- *A participant in a methadone maintenance program may not be subjected to discrimination on the basis of his/her use of methadone.*

The illegal use of prescription drugs that are "controlled substances" constitutes an "illegal use of drugs." As such, an individual with a disability who illegally uses prescription drugs and is terminated for such use is not protected by either the FEHA or ADA (provided, of course, that the employee is not subjected to differential treatment because of his/her disability, i.e., the employer also terminates non-disabled individuals for the illegal use of prescription drugs).⁴²

b. Alcoholism

Neither the FEHA nor the disability provisions of its implementing regulations mention the word "alcoholism."

However, the FEHA prohibits discrimination against alcoholics because it incorporates ADA's prohibitions articulated in the regulatory guidance that interprets ADA. Such guidance states: "Individuals disabled by

³⁸ 29 C.F.R. § 1630.3(a)(1) (07-1-02 Edition).

³⁹ 29 C.F.R. § 1630.3(a)(2) (07-1-02 Edition).

⁴⁰ T.A.M., 1992, at p. VIII-2.

⁴¹ *Ibid.*

⁴² *Ibid.*

alcoholism are entitled to the same protections accorded other individuals with disabilities under this part.”⁴³

Since the FEHA's inclusion of alcoholism as a disability derives from incorporation of ADA's definition of alcoholism, this is one area in which the FEHA's definition of alcoholism mirrors ADA's. Thus, much of ADA's guidance is relevant to analysis of cases arising under the FEHA.

Neither ADA nor EEOC's interpretive materials indicate whether alcoholism is a mental or physical disability. Thus, at this writing, this still remains an unresolved legal and medical issue.⁴⁴ The investigation should obtain medical evidence and expert opinion to ascertain whether the complainant's alcoholism is, under the FEHA, a mental or physical disability, or combination of both.

The use or overuse of alcohol does not automatically mean that the individual in question is a person with a disability under ADA or FEHA. Rather, an individual who *currently engages* in the overuse of alcohol is considered an individual with a disability if he/she meets one of the following criteria:

- 1) The individual's alcoholism substantially limits one or more major life activities; or
- 2) The individual is regarded as having an alcoholic impairment that [substantially] limits one or more major life activities; or
- 3) The individual has a record of such impairment.⁴⁵

An employer may prohibit the use of alcohol at the workplace by all employees and require that all employees refrain from being under the influence of alcohol while at the workplace.⁴⁶ An employer's duty to reasonably accommodate an individual disabled by alcoholism does *not* extend to making exceptions to such workplace policies/rules.

Likewise, an employer's duty to reasonably accommodate an alcoholic does not include making exceptions to qualification, performance and

⁴³ Appendix to 29 C.F.R. § 1630.16(b), (2000) at p. 372.

⁴⁴ ADA defines mental and physical disabilities in the same way, so the uncertainty has limited impact on the analysis of alcoholism cases. Under ADA, an individual with a disability is an individual who has “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;” or an individual who has a record of such an impairment or is regarded as having such an impairment. (42 U.S.C. § 12102(2).)

⁴⁵ Because ADA does not contain a separate definition of alcoholism, the definition applied here is the general definition set forth at 42 U.S.C. § 12102(2). But note that federal law requires a “substantial” limitation of one or more major life activities, while the FEHA only requires a showing of a limitation.

⁴⁶ 42 U.S.C. § 12114(c)(1) and (2).

conduct rules that apply equally to all other employees. An employer may require alcoholics to adhere to the same standards and conduct expectations as all other employees, even if the alcoholic employee's unsatisfactory performance or behavior is related to the individual's alcoholism.⁴⁷

*Example: An employee is often late or does not show up for work because of alcoholism. The employer can take disciplinary action based upon such conduct. However, the employer would violate ADA [and, by incorporation, the FEHA] if it disciplined the alcoholic employee more severely than other employees who engaged in the same conduct.*⁴⁸

Since an employer's duty to reasonably accommodate an alcoholic does not include making exceptions to uniformly applied qualification, conduct and performance expectations, what kinds of accommodation are required?

In California, "every private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer."⁴⁹ The obligation to provide reasonable accommodation does not, however, prohibit an employer from refusing to hire or discharging an employee who, as result of the current use of alcohol or drugs, cannot perform his/her duties or cannot perform his/her duties in a manner that does not endanger his/her own or the health or safety of other persons.⁵⁰ The employer must "make reasonable efforts" to safeguard the employee's privacy concerning the fact that he/she has enrolled in a rehabilitation program.⁵¹ The employer has no obligation to provide an employee time off with pay in order for the employee to undergo rehabilitation, but the employer must allow the employee to utilize any accrued sick leave for the purpose of entering and participating in a rehabilitation program.⁵²

Under ADA, as long as an employee who is an alcoholic remains qualified to perform the essential job functions, an employer's duty may include, for example, permitting a modified work schedule to allow the

⁴⁷ 42 U.S.C. § 12114(c)(4).

⁴⁸ T.A.M. at VIII-3.

⁴⁹ Labor Code section 1025.

⁵⁰ *Ibid.*

⁵¹ Labor Code section 1026.

⁵² Labor Code section 1027. Any employee who believes that he/she has been denied reasonable accommodation as required by Labor Code sections 1025-1027 may file a complaint with the California Labor Commissioner. (Lab. Code, § 1028.)

individual to attend an ongoing self-help program.⁵³ Case law suggests that reasonable accommodations for alcoholics typically include permitting the employee to take a leave of absence to obtain treatment or seek rehabilitation. An accommodation may also consist of requiring the employee to follow a treatment program and/or submit to random alcohol tests in lieu of discipline. However, if an employee's alcoholism continues to affect the individual's job performance *after* an employer has provided sufficient opportunity to seek treatment, an employer is under no obligation to provide repeated rehabilitation opportunities as an accommodation.⁵⁴

Under California law, such an individual might be deemed unable to perform the essential functions of his/her position with or without reasonable accommodation.⁵⁵ ADA's approach, also generally applicable under the FEHA, divides alcoholics into two groups. The first group consists of those who are "qualified individuals with a disability," i.e., can perform their essential job duties if given the opportunity to rehabilitate. Such individuals are protected by ADA and, by incorporation, the FEHA. The second group consists of those individuals discussed above whose rehabilitation efforts have failed such that their alcoholism continues to interfere with the performance of their job duties.

An employer may require employees to comply with the requirements of the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.) and other federal laws and regulations regarding alcohol despite the fact that their alcoholism may constitute a disability.⁵⁶ With respect to transportation employees, ADA specifically states that nothing therein

⁵³ *Ibid.*

⁵⁴ In *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805 [overruled on other grounds], the court held: "Although California cases on the subject are sparse, numerous federal appellate decisions hold summary judgment is proper in cases such as this one, where an employer discharges an employee whose alcohol abuse continued despite reasonable but unsuccessful attempts by the employer to encourage and accommodate a recovery from alcoholism." In reliance upon *Fuller v. Frank* (9th Cir. 1990) 916 F.2d 558, 561-562, the court observed that "an employee who has been reasonably accommodated by being allowed to try repeatedly but unsuccessfully to cure himself through programs designed to aid recovery from alcoholism, cannot gain yet another last chance despite prior warnings, and cannot stave off discharge indefinitely by attempting to enter into yet another course of treatment after each relapse." In *Fuller*, the employee's previous attempts at recovery had been unavailing so there was no guarantee that his latest attempt would have succeeded, either. An employee cannot forestall dismissal indefinitely by repeatedly entering treatment whenever dismissal becomes imminent due to a relapse. If that were the law, a "last chance agreement" entered into by the employer and employee would be rendered meaningless.

⁵⁵ EEOC suggests that, under such circumstances, the alcoholic would no longer be considered a "qualified individual with a disability," and, therefore, not subject to ADA's protections. (T.A.M. pp. VIII-3, 5.)

⁵⁶ 42 U.S.C. § 12114(c)(3) and (5).

should be construed ". . . to encourage, prohibit, restrict, or authorize . . ." entities subject to the jurisdiction of the Department of Transportation from lawfully exercising their authority to:

- 1) Test employees and applicants performing safety-sensitive duties for the illegal use of drugs and on duty impairment by alcohol; and
- 2) Remove employees and applicants from safety-sensitive positions when they test positive for the illegal use of drugs or on duty impairment by alcohol.⁵⁷

An employer may discharge or refuse to hire an individual with a history of alcoholism if the employer can demonstrate that the individual is unable to perform the essential job functions with or without reasonable accommodation or there is a high probability that the individual would return to alcohol abuse and poses an imminent and substantial danger to him/herself or others (see discussion of affirmative defenses below).⁵⁸ The defense is analogous to the FEHA's "danger to self and others" defense. Therefore, cases interpreting the federal provision may provide guidance. For example, to justify a discharge or refusal to hire an individual because of a history of alcoholism, the employer must be able to demonstrate a high probability of substantial harm to the individual or others which could not be reduced or eliminated with a reasonable accommodation such as periodic alcohol tests, increased supervision, etc. Additionally, the "significant risk of substantial harm" must be based on an assessment of the individual's history of substance abuse in light of the specific nature of the job in question.

*Example: An employer could justify excluding an individual who is an alcoholic with a history of returning to alcohol abuse from a job as a ship captain.*⁵⁹

c. Drug Use

The disability provisions of the FEHA do not extend to individuals who *currently* use illegal drugs.⁶⁰

However, individuals who are discriminated against because of a *prior history* of drug addiction or who are erroneously regarded as prior drug addicts may be protected under the FEHA through its incorporation of any ADA definition of disability that would result in broader protection of

⁵⁷ 42 U.S.C. § 12114(e)(1) and (2).

⁵⁸ Under ADA, the "danger to others" defense is called the "direct threat" defense. (42 U.S.C. § 12113(b).)

⁵⁹ T.A.M. at p. VIII-6.

⁶⁰ Gov. Code, § 12926, subds. (i) and (k).

individuals with disabilities.⁶¹ This is because ADA contains specific provisions describing the circumstances under which former users of illegal drugs are considered disabled.⁶²

As discussed above, the "illegal use of drugs" includes both the use of illegal substances such as cocaine, and the unlawful use of prescription drugs.⁶³ "Drug" refers to a controlled substance as defined in schedules I through V of Section 2 of the Controlled Substances Act (21 U.S.C. § 812).⁶⁴ As noted above, the "illegal use of drugs" means using, possessing, or distributing drugs which are unlawful under the Controlled Substances Act. However, the use of a drug taken under the supervision of a licensed health care professional does not constitute the "illegal use of drugs."⁶⁵

To be protected under the FEHA as a former user of illegal drugs or a "recovering drug addict," the employee must meet the following criteria:

- 1) Addiction is required to show a limitation of one or more life activities because of a mental or physical impairment, i.e., drug use. Therefore, an individual who is a past casual user of illegal drugs, but did not become addicted is not an individual with a disability based on drug use.⁶⁶
- 2) The employee must have participated in or successfully completed a supervised drug rehabilitation program, or otherwise achieved successful rehabilitation, and refrain from the current use of illegal drugs.⁶⁷ The term "rehabilitation program" refers to inpatient and outpatient programs, employee assistance programs, professionally recognized self-help programs such as Narcotics Anonymous, and any other programs that provide professional counseling or

⁶¹ Gov. Code, § 12926, subd. (l).

⁶² 42 U.S.C. § 12114(b), states: "Rules of Construction. Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who: (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use but is not engaging in such use; except that it shall not be a violation of this Chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs."

⁶³ Appendix to 29 C.F.R. § 1630.3 (07-1-00), p. 360.

⁶⁴ 29 C.F.R. § 1630.3(a)(1) (7-1-02 Edition).

⁶⁵ 29 C.F.R. § 1630.3(a)(2) (7-1-02 Edition).

⁶⁶ T.A.M. at VIII-4.

⁶⁷ 42 U.S.C. § 12114(b)(1) and (2); T.A.M. at VIII-3.

assistance (not necessarily medical) to individuals who illegally use drugs.⁶⁸

In addition to qualifying as an individual with a disability under the criteria discussed above, an individual is protected by ADA and FEHA if the individual has no prior history of illegal use of drugs, but is erroneously regarded or *perceived* as having engaged in such use.⁶⁹

Example: If an employer assumed an employee was addicted to illegal drugs based upon rumor and the employee's groggy appearance/behavior in the workplace, but the rumor was false and the appearance was a side-effect of a lawfully prescribed medication, the employee would be wrongfully perceived as an individual with a disability (a drug addict) and protected from discrimination based upon that false perception. If an employer did not perceive the individual to be an addict but, rather, as merely a social user of illegal drugs, the employee would not be perceived by the employer as an individual with a disability and would not be protected by the FEHA.⁷⁰ (See further discussion on perceived disability, below.)

The example highlights the importance of the employer's *perception* of the individual as an *addict*, rather than just a casual user of drugs, underscoring the boundary of the law's protection of prior drug addicts or individuals *perceived* as being such drug addicts. Individuals who have engaged in the casual use of illegal drugs (without being addicted to them) are *not* protected by the FEHA.

Employers may lawfully regulate and prohibit drug use in the workplace by all employees.⁷¹

Example: An employer may require that employees not come to work or return from lunch under the influence of alcohol or any drug(s) used illegally.

California law provides that employers may administer drug tests without violating the FEHA.⁷² However, (1) all entering employees in similar

⁶⁸ Appendix to 29 C.F.R. § 1630.3 (07-1-00), at p. 360.

⁶⁹ 42 U.S.C. § 12114(b)(3).

⁷⁰ T.A.M. at VIII-4.

⁷¹ 42 U.S.C. § 12114(c)(1); T.A.M. at VIII-4-5.

⁷² *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 865, 882-883. [In light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees – increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover – an employer, private or public, clearly has a legitimate (i.e., constitutionally permissible) interest in ascertaining whether

positions must be subjected to such tests, (2) the applicant or employee must be permitted to "submit independent medical opinions for consideration" before being disqualified based upon the results of the test, and (3) the results must be maintained on separate forms and treated as confidential medical records.⁷³

It remains to be seen if the employer's ability to reject job applicants or discipline employees who use marijuana may be constrained by the Compassionate Use Act (the Act) of 1996.⁷⁴ The purpose of the Act is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief," as well as "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."⁷⁵

The Legislature declared, however, that no portion of the Act is to be construed to supercede any law(s) prohibiting conduct that endangers others nor does it condone the "diversion of marijuana for non-medical purposes."⁷⁶

May a job applicant or employee with a disability who is currently using marijuana in accordance with the Act be barred from employment or subjected to disciplinary policies prohibiting such use?

Example: An employee who has a physical disability is prescribed marijuana by his physician when legally prescribed medications failed to relieve his pain and other symptoms (muscle spasms). When selected to receive a promotion, the employee was required to submit to a drug test. He provided the testing facility with his treatment provider's written recommendation to verify that his use of marijuana was consistent with the Act. The employee's drug test revealed Tetrahydrocannabinol (THC), the main chemical found in marijuana. When the employer received the test results, the employee was notified that he was being placed on suspension from his duties, so he also provided his employer with a copy of the

persons to be employed in any position currently are abusing drugs or alcohol." (Fns. omitted.)

⁷³ Cal. Code Regs., tit. 2, § 7294.0, subd. (d).

⁷⁴ Health and Safety Code section 11362.5.

⁷⁵ Health and Safety Code section 11362.5, subdivisions (b)(1)(A) and (B).

⁷⁶ Health and Safety Code section 11362.5, subdivision (b)(2).

physician's recommendation. Five days later, the employer terminated complainant's employment.

Complainant alleges that the employer violated the FEHA by discriminating against him because of his physical disability and failing to grant him a reasonable accommodation.

The employer contends that under federal law, marijuana is an illegal controlled substance and it is justified in establishing and maintaining workplace policies prohibiting its use by employees. The employer also argues that to do so does not constitute a violation of the FEHA.

The California appellate court framed the issue this way: "If an employer discharges an employee for using marijuana, even though it is being used for medicinal reasons in accordance with the Compassionate Use Act, does the discharge violate the FEHA, public policy, or an implied contract not to terminate the employee except for just cause?"

The appellate court concluded that while the Act decriminalizes the cultivation, possession and use of marijuana under specific circumstances related to medicinal use, it has no impact upon the federal Controlled Substances Act which deems marijuana illegal under any circumstances. Therefore, it ruled that the employer did not violate the FEHA.

The case is currently pending on appeal before the California Supreme Court.⁷⁷ DFEH staff should consult with a DFEH Legal Division Staff Counsel regarding any case that presents the same or similar issues.

Since the FEHA provides no protection to employees who "currently engage" in the illegal use of drugs, employers may refuse to hire current illegal drug users and may terminate employees who currently engage in the illegal use of drugs. Uncertainty exists, however, over what "current drug use" means.⁷⁸

Example: An individual tests positive for the illegal use of drugs, but asserts that he is currently in a rehabilitation program, having discontinued the use of illegal drugs several weeks ago. The

⁷⁷ *Ross v. Ragingwire Telecommunications, Inc.* (2005) 132 Cal.App.4th 590, review granted.

⁷⁸ Some courts have found that drug use was "current" when it occurred in the weeks or months just prior to the employee's discharge from employment, while others have concluded that abstinence over the course of nine months or a year was sufficient to provide the employee with protection under ADA. It is a fact-specific inquiry.

*individual asserts that the drug test yielded a positive result because drug residue is still in his system from a previous addiction. Is this individual currently engaging in the illegal use of drugs such that he is not protected by the FEHA? There is no hard and fast rule for resolving this situation such as set forth in the example. "[C]urrent drug use" means "that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis."*⁷⁹

Example: *An applicant or employee who tests positive for an illegal drug immediately enters a drug rehabilitation program seeking to avoid the possibility of rejection, discipline or termination by claiming that he/she is now in recovery and is no longer using drugs illegally. An individual who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation.*⁸⁰

Example: *Employee had a history of long-term addiction to heroin and alcohol which he overcame and remained sober for 10 years. During that period, he was promoted to the position of Store Manager for a retail chain of electronics stores. Among his duties was the enforcement of the employer's management policies, including its drug policy requiring that all employees remain free from the "effects of alcohol and illegal substances, whether consumed on or off Company property." The employee suffered a relapse and began procuring drugs from and using heroin with one of his subordinates. On August 24, he again sought treatment, provided his employer with a written statement acknowledging his*

⁷⁹ T.A.M. at VIII-2. EEOC also notes that "[e]mployers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. [Cite omitted.]" (Appendix to 29 C.F.R. § 1630.3 (7-01-00), at p. 360.) Note: The FEHA makes clear that employers may only inquire into the ability of an applicant to perform job-related functions. (Gov. Code, § 12940, subd. (e)(2).) An individual who claims that he/she has been subjected to discrimination because of past or perceived illegal drug addiction will be required to prove that he/she has a record of such addiction, or was perceived as having such an addiction.

⁸⁰ T.A.M. at VIII-3. Note: An employee who qualifies for California Family Rights Act (CFRA) leave and is a current drug user (or alcoholic) may be entitled to utilize such protected leave to enter a rehabilitation program.

misconduct on September 19, and on September 23, his employment was terminated. The employer stated that he was lawfully fired for violating its drug policy "by engaging in the use of illegal drugs to the knowledge of other employees, discussing drugs at the workplace, being under the influence of drugs at work, arriving late because of drug use, and failing to report an employee's [his subordinate's] drug use." The employee contended that his employment was terminated in violation of ADA because he was former drug-user. Sidestepping the question of whether or not the employee was a "current" drug-user due to the fact that he had only recently again ceased using, the court ruled that he failed to raise even an inference that the termination of his employment was a violation of ADA. The court stated that no reasonable jury could conclude that the employee was terminated for any reason other than his drug use and violations of the employer's workplace drug policy.⁸¹

Employers have additional rights with respect to the illegal use of drugs in the workplace:

- 1) Employers may require employees who engage in the illegal use of drugs to meet the same qualification, performance, and conduct standards as required of all other employees. This applies even if the employee's unsatisfactory performance is related to the individual's drug addiction.⁸²
- 2) An employer's duty to reasonably accommodate a rehabilitated drug addict does not include making exceptions to qualification, performance and conduct rules that apply to all other employees. However, an example of a reasonable accommodation would be that of giving a modified work schedule to a rehabilitated drug addict to allow the individual to attend an ongoing self-help program.⁸³ (See further discussion of reasonable accommodation below.)
- 3) Employers may require all employees to comply with the requirements of the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.) and other federal laws and regulations regarding the illegal use of drugs.⁸⁴

With respect to transportation employees, ADA specifically states that nothing in ADA should be construed " . . . to encourage, prohibit, restrict,

⁸¹ *Salley v. Circuit City Stores, Inc.* (3rd Cir. 1998) 160 F.3d 977.

⁸² 42 U.S.C. § 12114(c)(4).

⁸³ T.A.M. at VIII-5.

⁸⁴ 42 U.S.C. § 12114(c)(3).

or authorize" entities subject to the jurisdiction of the Department of Transportation from lawfully exercising the authority to:

- 1) Test employees and applicants performing safety-sensitive duties for the illegal use of drugs; and
- 2) Remove employees and applicants from safety-sensitive positions when they test positive for illegal use of drugs.⁸⁵

Despite the fact that the FEHA prohibits discrimination against rehabilitated drug addicts, employers may refuse to hire or retain such individuals if their prior addiction prevents them from performing the essential job duties or constitutes a direct threat to health and safety. Such defenses are raised most often in the context of professions that require strict adherence to the law, e.g., law enforcement.

Finally, like alcoholism, the question of whether prior drug addiction is a mental or physical disability remains an unresolved legal issue. Thus, DFEH investigation should include evidence and expert opinion regarding whether the complainant's rehabilitated drug addiction is a mental or physical disability, or a combination of both.

3. Perceived Disabilities

A perceived disability is a condition that is regarded by an employer as disabling or potentially disabling, even though the employee has no current disability or job-related health risk.⁸⁶

Example: Recall the example discussed above of the employer who assumed the employee was addicted to illegal drugs based upon rumor and the employee's groggy appearance/behavior in the workplace. The rumor was false and the appearance was a side-effect of a lawfully prescribed medication. The employer wrongfully perceived the employee as an individual with a disability (a drug addict) and protected from discrimination based upon that false perception.⁸⁷

Example: An insurance company hired the complainant as a "sales and debit agent." The position required the complainant to go door-to-door selling life insurance policies and collecting premiums. Agents were required to meet certain "quotas" and the company considered the job stressful, because of which the company had a policy prohibiting the employment of individuals with high blood pressure. When the company

⁸⁵ ADA of 1990, 42 U.S.C. § 12114(e)(1) and (2).

⁸⁶ *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 609-610.

⁸⁷ T.A.M. at VIII-4.

learned that the complainant had elevated blood pressure, it terminated his employment,⁸⁸ asserting that he could not perform the job without endangering his health. The employer's argument was rejected because the evidence showed that the complainant had successfully performed similar jobs without endangering his health. The employer's arguments were based merely on speculation and a stereotypical view of individuals with high blood pressure as being unable, as a class, to perform certain jobs.⁸⁹ The California Supreme Court found that

[t]he law [FEHA] was clearly designed to prevent employers from acting arbitrarily against physical conditions that, whether actually or potentially [disabling], may present no current job disability or job-related health risk.⁹⁰

Example: The 59-year-old complainant was a general manager at a family restaurant. She took leave from her duties due to thrombophlebitis, an inflammation of the veins in her legs. Her immediate supervisor visited the complainant while she was hospitalized where he observed her with an intravenous line in her arm being transported back to her room in a wheelchair following a sonogram. The supervisor thought he overheard a doctor discussing the complainant's condition, opining that she would need to find a desk job and would develop a blood clot if she did not continue treatment. The supervisor "believed that complainant had a terminal condition. [He] came to this belief even though he never spoke with any doctor or had access to any of complainant's medical reports."

In reliance upon that information, and in consultation with respondent's management team, the supervisor visited the complainant at her home after she was discharged from the hospital and suggested that she retire. He offered her work preparing respondent's payroll, but did not specify the associated wages, hours or work location. The complainant informed him that she would be resuming her regular duties and, in fact, was released by her treatment provider to return to work with no restrictions just two weeks later. Undeterred, the respondent's representatives prevailed upon the complainant's son to convince her to quit her job, arguing that they were afraid she would re-injure herself or not be able to perform her duties should she resume work. The respondent terminated the complainant's employment the very day her medical release was effective, issuing the following memorandum to

⁸⁸ *Id.* at 609.

⁸⁹ *DFEH v. American National Insurance Co.* (1978) FEPC Dec. No. 78-02. (The case was heard by the Fair Employment Practices Commission, the predecessor of the Fair Employment and Housing Commission which was established in 1980.)

⁹⁰ *Id.* at 610.

their employees and handing it to the complainant when she reported for work:

. . . as you all know [the complainant] has not been at work lately. She has been battling serious health problems all year. In order for her to focus on her health issues and to assist on her recovery, I have urged her to retire from [the restaurant].

The FEHC ruled that a preponderance of the evidence established that the complainant's perceived disability was a factor in the termination of her employment. When the complainant returned to work, she was told by her supervisor that she was being terminated because of her health. At hearing, when [the supervisor] was asked why he thought the complainant could not continue as a manager, he stated, "I felt it was terminal. I thought you were going to die," [The supervisor] further testified that he and [the owner] decided not to retain the complainant as a manager "[b]ecause of her legs."

*The respondent offered no credible affirmative defense at hearing. The motivation for the complainant's termination was best illustrated by management's discussion with her son. "[R]espondent terminated complainant based upon speculation that, as a result of her past condition, complainant would be unable to perform her duties in the future. This type of speculation, unsupported by medical expertise, cannot establish a defense under the [FEHA]."*⁹¹

Rarely will a respondent's discriminatory statements and accompanying conduct be as blatant as in the cases referenced above: "I cannot hire you because you have a physiological condition that affects your cardiovascular system and limits your ability to engage in major life activities;" "You are disqualified because your health impairment is no problem now, but it will require special education in the future;" or "I have to let you go because you have a physical condition that makes it unusually difficult for you to perform your duties."

There are no "magic words" that a respondent must enunciate in order for the complainant's perceived disability to be jurisdictional under the FEHA. Rather, the courts analyze the respondent's actions and related comments/statements to ascertain whether the alleged discriminatory action is related, at least in part, to the complainant's perceived disability. In this respect, perceived disability cases are analyzed in the same fashion as cases involving other kinds of alleged discrimination, i.e., the complainant is not required to show that the respondent made an employment decision knowing that its assumptions met the legal definition of perceived disability. Rather,

⁹¹ *DFEH v. Holmes Management, Inc. dba Cassidy's Family Restaurant* (2002) FEHC Dec. No. 02-08.

the focus is on the employer's attitude or treatment of the complainant as an individual with a disability, an individual who formerly had a disability, or an individual who may have a disability in the future.

Example: The complainant suffered a work-related injury and filed a workers' compensation claim. While that claim was pending and he was receiving medical treatment, he was laid off. Under the terms of the applicable collective bargaining agreement, he was placed on a recall list making him eligible to be rehired for up to five years. His treating physician opined that he could not return to his prior position as a metal fitter, so the complainant completed a vocational rehabilitation program.

However, the complainant contended that he was able to engage in strenuous physical activities after which he was "feeling fine." He accepted his former employer's offer to attend a composite training class to learn how to be a plastic parts fabricator and assembler (fabricator). He completed the course, performing all physical requirements without reinjury, and was offered a permanent position.

After reviewing his medical restrictions, the employer withdrew the job offer on the ground that the physical requirements of the position were inconsistent with the restrictions outlined by the complainant's physician. The complainant argued that he was not actually disabled, but the employer perceived him as being a person with a physical disability and based its employment decision upon that perception. The court agreed, finding that the employer "never maintained its decision not to hire [the complainant] was premised on anything other than its belief that medical restrictions imposed as a result of [his] lower back injury rendered him unable to perform the essential functions of a fabricator." Thus, the employer admitted that it perceived the complainant to be a person with a physical disability and based its employment decision upon that perception.⁹²

a. Perceived Physical Disabilities

There are three basic ways in which an individual might be subjected to discrimination on the basis of a perceived *physical* disability:

- 1) An individual has a condition or impairment which does not meet the definition of physical disability set forth in the FEHA, but is perceived by the employer as a person with a disability.

⁹² *Gelfo v. Lockheed Martin Corporation* (2006) 140 Cal.App.4th 34. [The appellate court remanded the matter back to the trial court for the jury to resolve the factual disputes concerning animus, harm and the substantiality of the employer's conduct as a factor in causing any harm suffered by the complainant.]

Example: An employee has controlled high blood pressure that does not limit his/her major life activity/activities. If the employer subjects the employee to an adverse employment action because of unsubstantiated fears that the individual will suffer a heart attack if he/she continues to perform strenuous work, the employer would be violating the FEHA by perceiving the individual as having a disability and making employment decisions in accordance with that perception.⁹³

- 2) An individual has a condition or impairment which does not meet the definition of physical disability set forth in the FEHA but results in limiting the individual's major life activity/activities solely because of the attitudes of others toward his/her condition.

Example: An individual may have a prominent facial scar or other disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit any of the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be making employment decisions that impact the individual as though he were a person with a disability, i.e., acting on the basis of a perceived disability.⁹⁴ Stated differently, the employer would be treating the employee as a person with a limitation of at least one major life activity, i.e., working.⁹⁵

- 3) The individual is not limited in any major life activities, but the employer erroneously believes that the individual has a condition which meets the definition of physical disability set forth in the FEHA.⁹⁶ This is the most frequently occurring example of perceived disability discrimination.⁹⁷

⁹³ Appendix to 29 C.F.R. § 1630.2(l) (7-01-00), at p. 354. (Recall the facts of *ANI*.)

⁹⁴ *Ibid.*

⁹⁵ T.A.M. at p. II-10.

⁹⁶ *Ibid.*

⁹⁷ Interpreting the Rehabilitation Act of 1973, the U.S. Supreme Court explained the rationale for the "regarded as" part of the definition of disability. *School Bd. of Nassau County, Fla. v. Arline* (1987) 480 U.S. 273, 283 addressed the dismissal of an elementary school teacher due to a bout with tuberculosis. The *Arline* Court noted that even if an individual's physical condition does not by itself limit a major life activity, it could result in such limitations because of the reaction of others. By including "regarded as" in the definition of disability, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." The *Arline* Court's rationale is applicable to the FEHA's "being regarded or treated as" definitions of disability set forth in Government Code section 12926, subdivisions (i)(4) and (5), and (k)(4) and (5) and discussed in *ANI*.

*Example: An employer believes a workplace rumor that an employee has AIDS and, on that basis, terminates the individual's employment. In reality, the employee is not a person with a physical or mental disability, or medical condition. The employer has discriminated against the individual on the basis of a perceived disability.*⁹⁸

The FEHA protects persons who are "perceived" as having disabilities from employment decisions "based on stereotypes, fears, or misconceptions about disability. It applies to decisions based on unsubstantiated concerns about *productivity, safety, insurance, liability, attendance, costs of accommodation, accessibility, workers' compensation costs or acceptance by co-workers and customers.*"⁹⁹

b. Perceived Mental Disabilities

There are at least three basic ways in which an individual might be subjected to discrimination on the basis of a perceived *mental* disability:

- 1) The individual has a mental or psychological disorder or condition that does not meet the definition of mental disability set forth in the FEHA because it does not limit at least one of the individual's major life activities. Nonetheless, he/she is perceived by the employer as having a mental disability.¹⁰⁰

Example: An individual has a mild form of anxiety disorder that does not limit his/her major life activities in any way. The employer has knowledge of the individual's condition and refuses to promote him/her to a management position because the employer believes that the anxiety disorder will significantly interfere with the individual's ability to handle the stress associated with supervising others. The employer has violated the FEHA by discriminating against the employee on the basis of a perceived mental disability.

- 2) The individual has a mental or psychological disorder or condition that does not meet the definition of a mental disability set forth in the FEHA. The disorder or condition limits at least one of the individual's major life activity/activities only because of the attitudes of others toward the condition.¹⁰¹

⁹⁸ *Id.* at II-11.

⁹⁹ *Ibid* [emphasis in original].

¹⁰⁰ Appendix to 29 C.F.R. § 1630.2(l) (7-01-00), at p. 354.

¹⁰¹ *Ibid.*

Example: An individual has a minor learning disability that requires him to read all instructions and procedural memoranda twice. The learning disability does not impact the individual's performance in any way, but the employer refuses to promote the individual to a management job because the employer is afraid that subordinate staff will not respect and take direction from someone who is "slower" than they are.

- 3) The individual has no mental or psychological disorder or condition, but the employer erroneously believes that the individual has a disorder or condition that meets the definition of mental disability set forth in the FEHA.¹⁰²

Example: An individual jokingly states she thinks she is a paranoid schizophrenic because mental illness and schizophrenia run in her family (neither of which is true). The employer treats her differently than other employees by always having a witness present during work-related discussions.

4. Medical Condition¹⁰³

"Medical condition" means either of the following:

- (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.
- (2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:
 - (A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his/her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.
 - (B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his/her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

¹⁰² *Ibid.*

¹⁰³ Gov. Code, § 12926, subd. (h); Cal. Code Regs., tit. 2, § 7293.6, subd. (g).

Prior to 1999, the definition of medical condition only included rehabilitated or cured cancer.¹⁰⁴ However, that year Government Code section 12926, subdivisions (h)(2)(A) and (B), were added to encompass genetic characteristics.

Cancer-related conditions which may or may not technically fall within the definition set forth above may also/alternatively meet the FEHA's other definitions of disability. Thus, cancer-related cases should be analyzed on the basis of both medical condition and physical disability.

Example: The complainant was employed by the respondent for nearly 20 years before suffering two bouts of cancer. She underwent surgery and chemotherapy which required her to be absent from work for approximately 12 weeks. When she resumed work, both she and the respondent believed her cancer to be in remission. Subsequently, the complainant underwent continuous follow-up monitoring, necessitating limited absences from work.

Four years after the cancer-related surgeries, the complainant was hospitalized for pneumonia and diarrhea, initially, but erroneously, thought to be related to cancer. On this occasion, she was absent from work for a total of approximately 22 days. When she returned to work, the respondent terminated her employment for "excessive absenteeism" and a fear that her absences would continue into the future.

The evidence showed that the respondent wrongly believed the complainant was absent more than other employees and would continue to be absent because of the cancer. The FEHC concluded that the respondent's belief was a factor in the decision to terminate her employment and, thus, constituted unlawful discrimination on the basis of medical condition.

DFEH also argued that the complainant's employment was terminated in violation of the FEHA's perceived physical handicap provisions then in effect. By speculating that she would continue to miss considerable time from work, DFEH successfully asserted that the respondent treated her as if she would suffer impairment in the future, thereby perceiving her to be disabled within the meaning of the FEHA.

The FEHC agreed with DFEH's reasoning, referencing one of its own prior decisions to explain the Legislative intent underlying the FEHA's medical condition provision:

In the Interstate Brands decision, we explained that in covering those who are rehabilitated from cancer under the "medical

¹⁰⁴ Stats. 1999, c. 311 (SB 1185), § 2.

*condition" provision, the intent of the Act is to provide protection for those who no longer suffer an extant health impairment but are perceived as being so impaired. As we made clear there, the cancer (medical condition) and physical handicap provisions of the Act are not independent, but rather overlap.*¹⁰⁵

5. Temporary vs. Permanent Disabilities

Under ADA, analysis of whether or not an individual is a person with a disability focuses upon the extent, *duration* and impact of the impairment in question. Thus, temporary, non-chronic impairments that do not last for a long period of time and have little or no long term impact upon the individual are not deemed disabilities. Broken limbs, sprains, concussions, appendicitis, common colds and flu are not considered disabilities under federal law.¹⁰⁶ Even under ADA, however, a complainant is not required to demonstrate that his/her disability is permanent in order to be entitled to protection. Rather, in addition to considering the "nature and severity" of the impairment, the courts will consider its "permanent or long term impact."¹⁰⁷

When determining whether a complainant is a person with a disability under the FEHA, emphasis should *not* be placed on the duration of the disability, i.e., whether it is "temporary" or "permanent." Although the California courts have not definitively decided whether the FEHA's protections apply only to persons with "permanent" disabilities, federal courts interpreting the FEHA concluded that "[n]oticeably absent from the FEHA's definition of physical and mental disability and from its Legislative findings about such definitions is language regarding the weight to be given to the duration of a condition in concluding whether a person is disabled due to such condition."¹⁰⁸

Example: A high school senior was walking to school with his friends. He entered the crosswalk situated right in front of the campus and, seeing no oncoming traffic, proceeded to walk across the street. While in the crosswalk, a motorist failed to see the student and his friends in the crosswalk and struck them, causing the young man to be thrown several hundred feet before landing on the pavement with his left leg

¹⁰⁵ *DFEH v. Kingsburg Cotton Oil Company* (1984) FEHC Dec. No. 84-30 at p. 20, citing *DFEH v. Interstate Brands Corporation* (1978) FEHC Dec. No. 78-05, at p. 11.

¹⁰⁶ T.A.M. at II-5.

¹⁰⁷ *Williams v. Philadelphia Housing Authority Police Department* (2004) 380 F.3d 751, citing 29 C.F.R. § 1630.2 (j)(2).

¹⁰⁸ *Diaz v. Federal Express Corp.* (2005) 373 F.Supp.2d 1034, 1049, fn. 9. The *Diaz* opinion focuses upon the definition of "mental disability," pointing out that a person with a disability is "one regarded as having, or *having had*, a mental condition or disorder that makes achievement of a major life activity difficult or that has no present disabling effect, but that may become a mental disability." (*Id.* at 1048.) Thus, "[b]ased on a simple reading of the statute, it appears that the California Legislature did not categorically exclude temporary disabilities, . . ." (*Ibid.*)

twisted underneath him, broken in several places. The young man is in the process of undergoing a series of several surgeries during which, for example, pins inserted to hold the bones in his leg together so that they would heal will eventually be removed. The surgeons are hopeful that the young man will make a complete recovery, but will not know the outcome until his treatment is concluded. He could suffer permanent weakness in his left leg, particularly his ankle, such that he would be permanently precluded from running, sprinting, jumping or walking long distances. The young man's treatment will not be concluded for at least one year, during which time he will use crutches, a cane, an orthopedic "moon boot" and other mitigating measures to help him walk. Is the young man a person with a physical disability, as that term is defined in the FEHA, during the period of time that he is undergoing treatment, i.e., prior to the final outcome of his series of surgeries is known? The California courts have not answered that question definitively, but the reasoning of the federal court could be applied to argue the he is.

Example: *In the case of the 24-year veteran of a housing authority police department who was diagnosed with "major depression, recurrent, severe" after a workplace incident, a fitness for duty report drafted four months later suggested that he needed ongoing psychological treatment for depression and stress management and should be granted alternate work assignments for a minimum of three months, after which his condition would be reevaluated to determine whether he was able to resume full peace officer duties. Further, the fitness for duty examiner opined that the complainant could work in an administrative and/or clerical capacity, but should not carry a weapon during the initial three-month period. He could, in that examiner's opinion, however, work with other officers who were wearing weapons.*

*Because neither the examining nor the complainant's personal physician could predict with certainty or assure that his condition would improve to the point that he could return to full duty, given the severity and recurrence of his condition, the court held that a reasonable jury could conclude his condition was not, applying federal legal standards, temporary.*¹⁰⁹

Example: The complainant worked for a telecommunications company selling long distance services. She took a medical leave to undergo treatment to uterine fibroid tumors, returning to work six weeks after successful surgery. Her compensation was based upon a monthly "real revenue" quota, calculating with reference to the actual charges billed to customers she enrolled in the employer's long distance plan. When she was warned approximately three months after returning from medical leave that she had failed to meet her monthly revenue quotas, she

¹⁰⁹ *Williams v. Philadelphia Housing Authority Police Department* (2004) 380 F.3d 751.

inquired as to whether or not her quotas were adjusted to account for the leave period were taken into account. Her supervisor did not provide an answer. About one month later, her employment was terminated and she filed suit claiming she was subjected to discrimination because of an actual and perceived physical disability. She contended that her medical leave “affected her ability to meet her quotas not only during the time she was actually absent from work but also for three or four months following her return because of the delay between obtaining a new long distance customer and receiving credit for the billings attributable to that new account.” The employer defended on the ground that the complainant’s temporary disability from which she had fully recovered by the time she resumed work did not entitle her to protection under either ADA or FEHA.

“The question whether a temporary impairment is protected under FEHA requires an individual analysis as to whether the impairment satisfies the statutory definition of a protected activity.” Under federal law, it is permissible to take the duration of the individual’s condition into consideration. However, the FEHA and Legislative history are both silent on this point. This court did not find the condition’s duration entirely irrelevant. Rather, “insofar as the duration of a condition can be shown to relate to the nature and severity of the impairment, duration is properly considered.”

Applying that standard to the facts of this case, the court held that the complainant’s condition (uterine fibroid tumors) and treatment (surgery followed by a six-week period of recovery) could not be deemed “‘de minimus’ in duration or degree as a matter of law and thus be summarily adjudicated as excluded from the protections of the law.” Rather, the question of whether or not the complainant’s condition limited one or more of her life activities is fact-specific and can only be answered by the trier of fact (jury).¹¹⁰

DFEH staff should focus investigative inquiries on whether or not a complainant’s “impairment impacts a person so as to make a major life activity difficult.”¹¹¹ Because this area of the law is evolving and unsettled, cases involving this issue should be evaluated in consultation with a DFEH Legal Division Staff Counsel.

6. Mitigating Measures

In 2001, the Legislature amended the FEHA, adding Government Code section 12926.1, subdivision (c) of which includes the following verbiage:

¹¹⁰ *Chaffee v. Sprint/United Management Company* (2007) 2007 WL 172306. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

¹¹¹ *Ibid.*

Under the law of this State, whether a condition limits a major life activity shall be determined *without respect to any mitigating measures*, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990.
[Emphasis added.]

AB 2222 was drafted, in part, in response to the United States Supreme Court's 1999 rejection of the regulations and interpretive guidelines promulgated by EEOC and U.S. Department of Justice, both of which provided that, under ADA, the "determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."¹¹² Rather, in interpreting ADA, the Supreme Court ruled that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."¹¹³ The Court defended its stance (and criticism from dissenting Justices Stevens and Breyer) by contending that taking mitigating measures into account would not serve to eliminate from the definition of "disabled" and, accordingly, ADA's protections, many persons who utilize mitigating devices, medications, and other measures:

The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability [under ADA] if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. . . The use or non-use of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.¹¹⁴

Mitigating measures include:

- a. Medications
- b. Assistive devices
- c. Prosthetics
- d. Reasonable accommodations

Under the FEHA, mitigating measures are not taken into account when determining whether an individual is a person with a disability *unless* the mitigating measure itself limits one or more of the individual's major life activities.

¹¹² *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471, 480, citing 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) (describing § 1630.2(j).)

¹¹³ *Id.* at 482.

¹¹⁴ *Id.* at 488.

Example: Twin sisters had severe myopia (near-sightedness). Their uncorrected visual acuity was 20/200 or worse in one eye and 20/400 or worse in the other eye. However, with assistive devices – corrective lenses – each of them had visual acuity of 20/20 or better in both eyes. When wearing corrective lenses, they were able to fully function as though they had no visual impairment. However, if they did not wear the corrective lenses, the evidence showed that they were unable to see well enough to perform many life activities, including but not limited to driving, watching television, shopping, etc. They applied for positions as pilots with a commercial airline and were found to have met all of the airline's age, education, experience, and Federal Aviation Administration certification qualifications. However, the airline rejected them because they did not satisfy its vision requirement of uncorrected visual acuity of 20/100 or better. The applicants claimed that they were subjected to discrimination on the basis of physical disability. Under the FEHA, a determination as to whether or not each applicant was a person with a physical disability would be made without taking into account the mitigating measure of corrective lenses. On that basis, the applicants would have been found to be persons with the physical disability of severe myopia: 1) They had a condition which affected one of their bodily systems, i.e., sensory organs; and 2) without taking into account any mitigating measure such as corrective lenses they were limited in one or more major life activities.¹¹⁵

Example: A fleet sales manager for a car dealership underwent amputation of his leg. He recuperated and was fitted with a prosthetic leg which enabled him to walk without crutches, a cane, or other device. His physician cleared him to return to his duties without any limitations. Is the manager a person with a physical disability, as that term is defined in the FEHA? Yes. He has a condition which affects his musculoskeletal system. The determination of whether or not it affects his ability to perform at least one major life activity is made without consideration of any prosthetic(s) or assistive device(s) he employs. Because he is limited in the life activity of walking, he is a person with a physical disability.¹¹⁶

Example: A forklift driver is diagnosed with bipolar disorder and prescribed medication which eliminates the symptoms of the disorder, but induces side effects, including intermittent dizziness and drowsiness. To determine whether or not the driver is a person with a mental disability under the FEHA, the medication, a mitigating measure, is not

¹¹⁵ *Id.* at 475-476. [To determine whether the applicants were subjected to unlawful discrimination, the airline's rejection of the applicants on the basis of health and safety considerations must be scrutinized]

¹¹⁶ *Dfeh v. Ford of Simi Valley, Inc. dba Simi Valley Ford* (2005) FEHC Dec. No. 05-05.

taken into consideration. Rather, it must be determined whether or not the driver is limited in at least one major life activity. The evidence establishes that bipolar disorder impacts the driver's ability to learn, interact with his co-workers, and work in the position of forklift driver. Therefore, he is a person with a mental disability.

Example: *The manager of a student store on a high school campus was responsible for opening and closing the store, restocking items for sale, taking and ordering inventory. She suffered shoulder, back and wrist injuries. The evidence shows that she is able to drive a car, walk, go yachting, travel, and work as an accounting technician so long as she takes the pain medication prescribed by her physician and her duties do not include lifting, pushing or pulling objects. Is the manager a person with a physical disability under the FEHA? The determination must be made without taking into account the mitigating measure of pain medication.*¹¹⁷

Example: *The complainant, a lock-and-dam operator, developed a "personality conflict" with a co-worker for which the employer concluded both men were "to blame for the problem." They were scheduled to work separate shift for eight weeks, but informed that they would thereafter be returned to their normally scheduled shifts and removed from their respective positions if the conflict continued.*

Soon after receiving that notification, the complainant was diagnosed with "adjustment disorder with mixed emotional features" and panic attacks. His treating psychiatrist recommended that he not interact with the co-worker with whom he experienced conflict. When the employer scheduled them to work together anyway, the complainant refused, stating that he feared for his own safety and that of his co-workers, including the one with whom he had the conflict. The employer offered him a position at another location with the same pay, but lower classification. The complainant also applied for another position, but was not selected. Eventually, concluding that its operations would suffer if its employees could not get along, the employer transferred the complainant to comparable position at a facility 90 minutes away.

The complainant contended that he had been subjected to discrimination because of his disabilities – sleep apnea, chronic depression, irritable bowel syndrome, judgment disorder and panic attacks. He asserted that he was limited in the two major life activities of sleeping and working. His physicians reported the he had trouble sleeping through the night on most nights, suffered from insomnia, was able to sleep during the day

¹¹⁷ *Parcel v. Pasadena Unified School District* (2005) 2005 WL 1762232. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

but not at night, and was in a state of emotional upheaval characterized by sleeplessness. The complainant testified that he was required to “medicate myself to sleep every night.” Nonetheless, the federal court found that evidence insufficient to sustain his claim that his ability to sleep was substantially limited because he did not submit evidence of the “precise impact that his ailments [had] on his sleep patterns.” Moreover, the court found that he had successfully mitigated his sleep problems through medication and, therefore, concluded that he was not a person with a disability.

*Under the FEHA, the complainant would be found to meet the statutory definition of a person with a physical and mental disability. Additionally, the evidence of the complainant’s limitation in the major life activity of sleeping would be considered without regard to any mitigating factors such as medication and would likely be held by a court to be more than sufficient to demonstrate the existence of the limitation.*¹¹⁸

7. Major Life Activities¹¹⁹

As set forth above, the California Legislature has decreed that the term “major life activities” is to be “broadly construed and includes physical, mental, and social activities and working.”¹²⁰

“Major Life Activities” are functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Primary attention is given to those life activities that affect employability, or otherwise present a barrier to employment or advancement.¹²¹

Other activities might include, but not be limited to, sitting, standing, lifting and reading.¹²²

The Poppink Act clarified that, under California law, the definitions of physical and mental disability have always required only a “limitation” upon a major life activity, rather than, as federal law stipulates, a “substantial limitation.”¹²³

¹¹⁸ *Greathouse v. Westfall* (2006) 2006 WL 3218557 (slip copy).

¹¹⁹ Gov. Code, §§ 12926, subds. (k)(1) and 12926.1; Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(2)(a).

¹²⁰ Gov. Code, § 12926, subd. (k)(1)(B)(iii).

¹²¹ Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(2)(a). The list of major life activities set forth above is illustrative only.

¹²² T.A.M. at II-3.

¹²³ Gov. Code, § 12926.1, subd. (c). In 2003, the California Supreme Court resolved the question of whether the Poppink Act should be applied “retroactively.” The Court observed that “before and after passage of the Poppink Act the FEHA’s test was ‘limits,’ not substantial limits. Moreover the Legislative history of the Poppink Act supports the view that the Legislature

“[T]he FEHA does not require that the disability result in utter inability or even substantial limitation on the individual's ability to perform major life activities. A limitation is sufficient.”¹²⁴

In deciding whether an individual is limited in a major life activity, “the proper comparative baseline is either the individual without the impairment in question or the average *unimpaired* person.”¹²⁵ The FEHC has focused its inquiry upon medical evidence showing the individual's limitation(s) relative to that individual's own unimpaired state.¹²⁶ For instance, the FEHC noted, in one decision, a “25 percent reduction of [the complainant's] former capacity to lift.”¹²⁷ In another case, the FEHC remarked that the complainant had “lost approximately 50% of her preinjury capacity” for manual tasks.”¹²⁸

The FEHC has also tacitly compared individual complainants' limitation(s) by reference to the “normal” or “average” population. For example, when the FEHC notes that a complainant experiences difficulty performing tasks such as dressing or sleeping, the implied presumption is that most people who do not have a disability can perform such tasks without difficulty.¹²⁹ More blatantly, the FEHC observed that being able to work 40 hours per week was not a limitation on a major life activity because 40 hours is “considered a full work week in our culture.”¹³⁰

The Poppink Act declared that “‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”¹³¹ In other words, under the FEHA, protection is provided to an individual whose physical or mental disability affects his/her ability to perform the specific job in question, not a broad range of jobs.

Example: An applicant for the position of sheriff's deputy was rejected because he was color blind. Specifically, he was affected by protanopia, the inability to see red and found to have “extensive color confusion” and a “severe color vision deficit.” He failed the tests administered by the prospective employer and was informed that, in accordance with POST (Police Officer Standards and Training)

merely clarified the existing ‘limits’ test in the FEHA and, . . . did not retrospectively change that test.” (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030-31.)

¹²⁴ [DFEH v. California Department of Corrections](#) (2003) FEHC Dec. No. 03-11 at p. 8.

¹²⁵ *E.E.O.C. v. United Parcel Service, Inc.* (9th Cir. 2005) 424 F.3d 1060, 1071.

¹²⁶ *Ibid.*

¹²⁷ *DFEH v. California Department of Corrections* (2003) FEHC Dec. No. 03-11.

¹²⁸ [DFEH v. Albertson's, Inc.](#) (2003) FEHC Dec. No. 03-05 at p. 12.

¹²⁹ *DFEH v. California Department of Corrections* (2003) FEHC Dec. No. 03-11 at p. 8. See also *Toyota Motor Mfg., Kentucky, Inc. v. Williams* (2002) 534 U.S. 184.

¹³⁰ [DFEH v. Jefferson Smurfit Corporation](#) (1997) FEHC Dec. No. 98-01 at p. 5.

¹³¹ *DFEH v. California Department of Corrections* (2003) FEHC Dec. No. 03-11.

*guidelines, because he could not identify colors immediately and accurately, he was not qualified for the position. The appellate court ruled that the applicant was not a person with a disability nor perceived by the prospective employer as a person with a disability because he was not substantially limited in the major life activity of working. Rather, the court ruled that color-vision was a valid job requirement for a deputy sheriff and a bona fide occupational qualification for patrol duties. The California Supreme Court expressly overruled the appellate court's finding to the extent that the appellate court applied the federal standard, i.e., the substantial limitation test, to the applicant's claim of discrimination on the basis of physical disability.*¹³²

Note: Any case involving questions about color blindness or other limitations of visual acuity impacting a peace officer or peace officer candidate should be discussed with a DFEH Legal Division Staff Counsel.

Example: *An employee of a vehicle manufacturing plant suffered from bilateral carpal tunnel syndrome and tendonitis caused by the use over time of pneumatic tools to perform repetitive tasks. Her physician restricted her lifting, repetitive movements, overhead work, and use of vibratory or pneumatic tools. The employer nonetheless required her to perform repetitive movements and work with her hands and arms at shoulder level for several-hour stretches, which caused her to develop additional physical problems (myotendinitis and thoracic outlet compression).*

She contended that the employer violated ADA by failing to provide her with a reasonable accommodation of her disabilities, asserting that she was substantially limited in her ability to perform manual tasks, housework, gardening, playing with her children, lifting and working. The United States Supreme Court ruled that "even assuming that working is a life activity, a claimant would be required to show an inability to work in a broad range of jobs, rather than a specific job." Finding that the employee was not disabled under ADA, the Court focused upon her ongoing ability to "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry and pick up around the house." The Court observed that the "changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual-task disability as a matter of law."

Under the FEHA, the employee would have been found to be physically disabled. "Working" is a major life activity under the FEHA. Since the employee was limited in both her ability to perform manual tasks and

¹³² [Diffey v. Riverside County Sheriff's Dept. \(2000\) 84 Cal.App.4th 1031](#), overruled by [Colmenares v. Braemar Country Club, Inc. \(2003\) 29 Cal.4th 1019, 1031, fn. 6.](#)

work, the analysis under the FEHA would emphasize whether she could engage in a “particular employment or a class or broad range of employments,” as well as her “employability” and whether or not her limitations “present a barrier to employment or advancement.” Limitations on other major life activities besides the performance of manual tasks and working might also be relevant to the analysis, but not dispositive.¹³³

Example: The complainant, a relief clerk in a convenience store, provided documentation from her treating physician that she had “arthritis, possible reflex sympathetic dystrophy” and should be placed on light duty. Her employer granted the requested accommodation, extending the duration of her assignment to light duty several times in accordance with updated notes from her physician. The employer advised the complainant of its policy limiting the duration of light duty status to six months, asking for her resignation even though she had not yet reached the six-month milestone. When she refused to resign, the employer terminated her employment, noting, in writing, the reasons as “Job: Can’t stand on feet.”

The federal court found that the complainant was not disabled, in part because she was able to “feed herself, bathe herself, drive her automobile, take care of all her daily needs, and did not use a cane, nor had she ever had a cane.” Therefore, she failed to produce sufficient evidence that she was limited in the major life activity of walking to demonstrate that she was disabled under ADA. The court also rejected the complainant’s argument, based upon the comment noted above, that her employer perceived her as being disabled.

Under the FEHA, the complainant would be deemed a person with a disability, entitled to protection. Arthritis is a disorder that affects the musculoskeletal system which limited the complainant in the major life activities of standing and walking. Additionally, the employer failed to engage in an interactive process for the purpose of determining if a reasonable accommodation could be implemented.¹³⁴

Example: A sheriff’s investigator suffered a head injury while executing a search warrant. As a result, he developed a mental disability (posttraumatic stress disorder, concussion syndrome and neurological problems) which precluded him from returning to work as a peace officer. However, he could work in other capacities. Government Code section 12926.1 provides that “not being able to work at a ‘particular

¹³³ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, (2002) 534 U.S. 184.

¹³⁴ *Lawler v. Quiktrip Corporation* (2006) 172 Fed.Appx. 873. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

employment' is enough to constitute a major life activity limitation. This means that the fact an employee's condition prevents him from performing his existing job is enough to establish he suffers from a disability for FEHA purposes, even though he can perform a different job. '[I]f the ability to work in some capacity were the test of covered disability, then no disabled person could ever state a FEHA claim based on failure to accommodate.'"¹³⁵ Thus, in order to show that the employee had a mental disability, it need only be established that he was limited in his ability to perform his job as a sheriff's investigator.¹³⁶

Example: A 24-year veteran of a housing authority police department made "a number of profane and threatening remarks" to his superior officer, and told a counselor later that same evening, "I understand why people go postal." He was diagnosed with "major depression, recurrent, severe." The fitness for duty report revealed that he needed ongoing psychological treatment for depression and stress management and should be granted alternate work assignments for a minimum of three months, after which his condition would be reevaluated to determine whether he was able to resume full peace officer duties.

Specifically, the fitness for duty examiner opined that the complainant could work in an administrative and/or clerical capacity, but should not carry a weapon during the initial three-month period. The examiner stated that, in her opinion, however, the complainant could work with other officers who were wearing weapons.

The complainant requested that he be assigned to work in the radio room as a reasonable accommodation of his limitation. The police department did not respond to his request, terminating the officer's employment when he failed to heed its suggestion that he apply for a medical leave of absence. The police department's refusal was based upon its belief that the complainant could not work around others carrying firearms or have access to weapons, and advised him he would be required to complete "all" of his necessary medical treatment and receive authorization from his physician to carry firearms before being restored to "patrol duty." The police department independently concluded that the complainant's limitations were more extensive than the medical professionals' specifications, including its own fitness for

¹³⁵ *DFEH v. County of Riverside* (2006) 2006 WL 724533 at p. 12, citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 259. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

¹³⁶ Additional evidence adduced at trial pertaining to his physical, mental, and social activities also established that the sheriff's investigator was a person with a mental disability, however. For instance, his wife testified that he was "not the same man" he had been before sustaining a head injury. He had difficulty being in crowds or stressful situations, was less tolerant of his teenage children, and experienced diminished intimacy in his relationship with his wife. (*Ibid.*)

*duty examiner's, thereby substituting its judgment for that of the physicians. "[E]mployers cannot misinterpret information about an employee's limitations to conclude that the employee is incapable of performing a wide range [or class] or jobs [citation omitted]." A reasonable jury could conclude that the complainant's actual limitations did not disqualify him from working in the radio room.*¹³⁷

D. Relationship of FEHA Provisions to California Family Rights Act

The California Family Rights Act (CFRA) is set forth at Government Code section 12945.2. It guarantees the right of an eligible employee to take an employment leave of up to the equivalent of 12 workweeks in a 12-month period for his/her own serious health condition, to care for a family member who has a serious health condition, or for the birth, adoption or foster care placement of a child without fear of not being allowed to return to work following the leave.¹³⁸ CFRA leave may be taken either in one continuous period of time or intermittently in increments as small as an employer's payroll system uses to account for absences.¹³⁹

If a complainant's physical or mental impairment or condition does not qualify as a physical or mental disability or medical condition under the definition set forth in the FEHA, DFEH staff should *always* consider whether the impairment is a "serious health condition" subject to protection under CFRA. Although a serious health condition does not assure an employee the right to be granted a reasonable accommodation, the complainant may be entitled to a protected leave in accordance with CFRA.

See further discussion in the Chapter entitled "California Family Rights Act (CFRA)."

E. Relationship of Complaints Arising Out of Work-Related Injuries Resulting in Disability and the Workers' Compensation Act

It is important to understand that the workers' compensation process is *separate from* the employer's obligations under the FEHA and an employee's rights under

¹³⁷ *Williams v. Philadelphia Housing Authority Police Dept.* (3rd Cir. 2004) 380 F.3d 751 [The federal court characterized the police department as having "perceived" the officer to have limitations upon a life activity beyond those enumerated by the physicians, thereby leading to a conclusion under ADA that the complainant was a person "regarded as" having a disability. However, under the FEHA, there would be no dispute that the complainant was a person with a mental disability and the legal inquiry would focus upon whether the complainant was denied a reasonable accommodation because of the employer's failure to adhere to the physicians' guidelines. See further discussion below.]

¹³⁸ Gov. Code, § 12945.2, subd. (c)(3); Cal. Code Regs., tit. 2, § 7297.0, subd. (h). Unfortunately, it is still not unusual for employers/respondents to erroneously apply the federal "substantial limitation" standard when analyzing an employee's ability to perform the essential functions of his/her position.

¹³⁹ Gov. Code, § 12945.2, subd. (c)(3); Cal. Code Regs., tit. 2, § 7297.3, subds. (a) and (e).

the FEHA are separate and apart from his/her entitlements under the workers' compensation statutory scheme. An employee who suffers a work-related injury may file a workers' compensation claim and be deemed permanently disabled, i.e., "permanent and stationery." The receipt of such a rating and/or any subsequent benefit(s) provided to that employee through the workers' compensation system do *not* relieve the employer of its obligation to engage in the interactive process with the employee to determine any available reasonable accommodation(s).¹⁴⁰

A number of appellate court and FEHC decisions addressing injuries which occurred prior to the 1992 and 1993 amendments to the FEHA held that DFEH did not have jurisdiction over complaints arising out of such injuries due to the exclusive remedy provisions of the Workers' Compensation Act and, more specifically, claims arising under Labor Code section 132a.¹⁴¹

However, effective January 1, 1994, Government Code section 12993, subdivision (a), was amended¹⁴² to make clear that "[n]othing contained in [the FEHA] shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this State relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, unless those provisions provide less protection to the enumerated classes of persons covered under this part." The amendment of section 12993 reopened the jurisdictional question which was resolved in 1998 by the California Supreme Court. It ruled, in partial reliance upon Government Code section 12993, subdivision (a), that Labor Code section 132a does not provide an exclusive remedy to an employee who suffers a work-related injury that results in a disability.

A construction of [Government Code] section 12940, subdivision (a), that narrows the term "disability" to disabilities unrelated to work seems inconsistent with the principle of liberal construction. Furthermore, our decisions have consistently emphasized the breadth of the FEHA. In *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, we considered whether the FEHA covered State civil service employees despite similar anti-discrimination provisions in the Civil Service Act. (See Gov. Code,

¹⁴⁰ E.E.O.C. Enforcement Guidance on Workers' Compensation and ADA, EEOC Notice No. 915.002, question number 25 (September 1996).

¹⁴¹ Labor Code section 132a(1) provides: "Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he/she has filed or made known his/her intention to file a claim for compensation with his/her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars (\$10,000), together with costs and expenses not in excess of two hundred fifty dollars (\$250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

¹⁴² Stats. 1993, c. 1277 (AB 2244), § 15.

§ 19702, subd. (a).) We concluded that "[t]he FEHA was meant to supplement, *not ... be supplanted by*, existing anti-discrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination...." (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d at p. 431, italics added.) Similarly, in *Rojo v. Kliger* (1990) 52 Cal.3d 65, we considered whether victims of sex discrimination could bring common law wrongful discharge claims in addition to FEHA claims. We concluded that the Legislature intended the FEHA "to amplify" (*Rojo*, 1990, 52 Cal.3d at p. 75) other remedies and "to expand" (*id.* at p. 80) the rights of persons who are victims of employment discrimination. (See also *Jennings v. Marralle* (1994) 8 Cal.4th 121, 135 [The Legislature intended "to create new rights within the FEHA statutory scheme while leaving existing rights intact..."].) None of these cases suggest that non-FEHA remedies circumscribe the scope of the FEHA.¹⁴³

Therefore, the fact that a complainant has filed a claim under Labor Code section 132a will not preclude him/her from also filing a complaint alleging discrimination because of disability with DFEH. Such double filing will not provide the respondent employer with an automatically viable defense to DFEH complaint on jurisdictional grounds because section 132a "does not preclude an employee from pursuing FEHA . . . remedies."¹⁴⁴ However, "to the extent section 132a and the FEHA overlap, equitable principles preclude double recovery for employees. For example, employees who settle their claims for lost wages and work benefits as part of a section 132a proceeding could not recover these damages as part of a subsequent FEHA proceeding."¹⁴⁵

F. Pre-Employment Medical or Psychological Inquiries and Examinations

Prior to extending a job offer, an employer may ask questions about the applicant's ability to perform specific job functions. Job offers may be conditioned upon satisfactory responses to such inquiries and/or a post-offer medical or psychological examination.¹⁴⁶

However, it is an unlawful employment practice for:

any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an application, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability or medical condition.

¹⁴³ *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1156-57.

¹⁴⁴ *Id.* at 1158.

¹⁴⁵ *Ibid.*

¹⁴⁶ T.A.M. at V-5.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job-related and consisted with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.¹⁴⁷

1. Permissible Pre-Employment Inquiries

Permissible pre-employment inquiries are those that focus on the applicant's *ability* to perform the job in question.¹⁴⁸ Before extending an offer of employment, an employer may ask job candidates about their ability to perform specific job functions, tasks or duties so long as the questions are not phrased so as to force the applicant to reveal whether or not he/she is a person with a disability and/or the details of any such disability.¹⁴⁹

Example: An employer provides a job application with a written application form to which is attached a job description outlining the specific functions of the position, as well as a supplemental questionnaire setting forth the following questions:

- *Are you able to perform the functions outlined in the attached job description with or without reasonable accommodation?*
- *If your answer to the above question is "Yes, with reasonable accommodation," please describe how you would perform the tasks listed and what accommodation(s) you will need.*

*The employer has not violated the FEHA so long as it neither eliminates the applicant who reveals that he/she will need reasonable accommodation(s) to perform the functions of the position from consideration nor refuses to hire him/her because of the fact that he/she is a person with a disability.*¹⁵⁰

An employer may also ask all applicants to describe or demonstrate how they will perform a specific job, with or without an accommodation, so long as all

¹⁴⁷ Gov. Code, § 12940, subd. (e)(1)-(3).

¹⁴⁸ T.A.M. at V-5.5(d).

¹⁴⁹ *Id.* at V-5.5.

¹⁵⁰ *Id.* at V-9.

applicants are required to do so, irrespective of disability or medical condition.¹⁵¹

*Example: An individual with one arm applies for a position as a delivery driver. The interviewer may not ask the applicant how his/her disability impacts his/her ability to drive a vehicle. It is lawful for the interviewer to inquire about the applicant's ability and experience by inquiring into whether or not the applicant possesses a valid driver's license, has experience working as a delivery driver, has been cited for any moving violations, has been involved in any accidents while driving and/or can perform any special aspect of driving that is required, e.g., making frequent long-distance trips, driving in populous metropolitan areas during peak traffic hours, etc., with or without reasonable accommodation(s).*¹⁵²

Prospective employers may ask applicants about their educational background, prior work experience, and attendance record on previous jobs, but may not ask if a poor attendance record was due to illness, accident or disability. The employer may also provide information to job applicants either verbally or in writing about its regular work hours, leave policies, special attendance needs such as, for instance, the need for employees to work overtime on a seasonal basis, etc., asking the candidate, "Can you meet our attendance requirements?"¹⁵³

2. Impermissible Pre-Employment Inquiries

The FEHA prohibits employers from asking general questions about an applicant's health or medical history during the course of job interviews, on written applications or pre-employment questionnaires, or in the course of conducting background investigations.¹⁵⁴

Example: An employer may not ask the following or similar questions –

- *"Do you have any particular disabilities?"*¹⁵⁵
- *"Have you ever been treated for any of the following diseases or conditions?" (followed by a checklist of diseases or conditions)*¹⁵⁶
- *"Are you now receiving or have you ever received Workers' Compensation benefits?" or*

¹⁵¹ *Id.* at V-13.

¹⁵² *Id.* at V-11.

¹⁵³ *Id.* at V-15.

¹⁵⁴ T.A.M. at V-7.

¹⁵⁵ Cal. Code Regs., tit. 2, § 7294.0, subd. (b)(2)(A).

¹⁵⁶ Cal. Code Regs., tit. 2, § 7294.0, subd. (b)(2)(B).

*"Have you ever filed a Workers' Compensation claim?"*¹⁵⁷

- *"Please list any conditions or diseases for which you have been treated in the past 3 years."*¹⁵⁸

Prior to extending a conditional offer of employment, an employer may not ask any question that tends to identify the applicant as a person with a disability or reveal that the applicant has/had a disability. An employer may not ask any "disability-related question," i.e., any question likely to elicit information about the nature or severity of the disability, condition(s) causing the disability, prognosis/expectation concerning the condition or disability, future treatment or leave of absence needed because of the disability.

Example: An employer may not ask the following or similar questions –

- *"Is there any health-related reason you may not be able to perform the job for which you are applying?"*¹⁵⁹
- *"How many days were you absent from work because of illness last year?"*¹⁶⁰

Such an inquiry may seem on its face to be performance-related and, therefore, legitimate. But it may impermissibly identify the applicant as a person with a disability or serve as a basis upon which the employer may discriminate against that individual in violation of Government Code section 12940, subdivision (d), and California Code of Regulations, title 2, section 7287.3, subdivision (b)(1), and section 7294.0, subdivision (b)(3.)

- *"Are you taking any prescribed drugs?"*¹⁶¹

The results of a drug test may indicate the presence of a lawfully prescribed drug and the fact that the applicant has a disability. Such results must be treated as a confidential medical record.

- *"Have you ever been treated for drug addiction?"*¹⁶²

The question is tantamount to asking whether or not the applicant has a disability since, as discussed above, prior addiction is

¹⁵⁷ Cal. Code Regs., tit. 2, § 7294.0, subd. (b)(2)(C).

¹⁵⁸ T.A.M. at p. 94,698.

¹⁵⁹ T.A.M. at V-7.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Id.* at V-8.

deemed a disability and brings the individual within the FEHA's protections.

- *"Have you ever used illegal drugs?"*
- *"When is the last time you used illegal drugs?"*
- *"How much alcohol do you currently drink?"*
- *"Have you ever participated in an alcohol rehabilitation program?"*
- *"Have you ever been arrested for driving under the influence of alcohol?"*
- *"Do you drink alcohol?"*

Such questions are impermissible under the FEHA because they may directly or indirectly identify an individual as a person who has or has had a disability.

- *"Will you require a reasonable accommodation in order to perform this job?"*

An affirmative response to that inquiry will identify an individual as a person with a disability.

Therefore, an appropriate and permissible inquiry focuses on job performance: "Can you perform the essential functions of the position for which you are applying with or without a reasonable accommodation?"

An employer "may respond to an applicant's request for reasonable accommodation."¹⁶³ In fact, such a request triggers the employer's obligation to enter into an interactive process with the applicant or employee.¹⁶⁴

Example: An individual applying for a position as a receptionist reveals during the pre-employment phase that he/she has diabetes and will need periodic breaks from his/her duties in order to monitor his/her blood sugar and, perhaps, take medication. The employer may reasonably inquire how often the applicant will need to take breaks, the duration of the breaks, etc., for the purpose of determining whether the applicant will be able to perform the essential functions of the position with an accommodation (in this instance, the ability to take breaks, as needed), as well as consider whether granting an accommodation would impose

¹⁶³ Gov. Code, § 12940, subd. (e)(2).

¹⁶⁴ Gov. Code, § 12940, subd. (n).

an undue hardship upon the employer. (Who will cover the front desk when the receptionist is on break? Would this require hiring another employee? Etc.) The employer may not ask questions about the applicant's underlying condition, diabetes, however.

Example: *An applicant with a severe and obvious visual impairment applies for a job involving computer work. The employer may ask whether he/she will need reasonable accommodation to perform the essential functions of the job.*

- *If the applicant answers "no," the employer may not ask additional questions about reasonable accommodation (although, of course, the employer could ask the applicant to describe or demonstrate performance).*
- *If the applicant says that he/she will need accommodation, the employer may ask questions about the type of required accommodation such as, "What will you need?" If the applicant says he needs software that increases the size of text on the computer screen, the employer may ask questions such as, "Who makes that software?" "Do you need a particular brand?" or "Is that software compatible with our computers?" However, the employer may not ask questions about the applicant's underlying condition. In addition, the employer may not ask reasonable accommodation questions that are unrelated to job functions such as, "Will you need reasonable accommodation to travel to/from work each day?"¹⁶⁵*

An employer may only ask about a reasonable accommodation that is needed now or in the near, foreseeable future. An applicant is not required to disclose reasonable accommodations that may be needed in the more distant future.¹⁶⁶

Employers may also ask applicants to describe or demonstrate how they will be able to perform certain job functions so long as all applicants are subjected to the same request.¹⁶⁷

The prohibitions on pre-employment inquiries apply equally to the covered entity *and* its agents and employees. Thus, if a prospective employer contracts with another firm or organization to conduct pre-employment background investigations on its behalf, the investigating entity must also comply with the FEHA.

¹⁶⁵ EEOC, Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations (10-10-95) at p. 6.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Id.* at p. 2, 4.

No background investigation may include inquiries posed to previous employers or other sources concerning a job applicant's disability, illness or history of illness, history of workers' compensation claims.¹⁶⁸

3. Post-Offer Employment Inquiries and Examinations

After a job offer has been extended, but before the candidate has commenced work, an employer may request limited information about an applicant's physical fitness or medical condition *or* require the applicant to undergo a medical or psychological examination.

a. "Medical Examination"

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental health.¹⁶⁹

Factors considered when determining whether a procedure or test is "medical:"

- 1) Is the test administered by a health care professional or an individual trained by a health care professional?
- 2) Are the results interpreted by a health care professional or an individual trained by a health care professional?
- 3) Is the test designed to reveal details about the applicant's physical or mental health?
- 4) Is it the employer's goal to determine the status of the applicant's physical or mental health or existence of any physical or mental impairments?
- 5) Is the test or any portion thereof invasive (e.g., require the drawing of blood or collection of urine)?
- 6) Does the test seek to measure an applicant's performance of a task(s) or his/her physiological response to performing a task(s)?
- 7) Is the test in question normally given in a medical setting?
- 8) Does the test employ the use of medical equipment?¹⁷⁰

¹⁶⁸ T.A.M. at V-16-17.

¹⁶⁹ EEOC, Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations (10-10-95) at p. 11.

*Example: An employer requires applicants to demonstrate that they can lift a box weighing 30 pounds and carry it at least 20 feet. Such is a test of physical agility, rather than a medical examination. However, if the employer monitors the applicant's blood pressure or heart rate during or after the lifting and carrying exercise, the test would be deemed a medical examination because it would seek to measure the applicant's physiological response to lifting and carrying.*¹⁷¹

Many employers require physical agility tests or demonstrations of physical ability (see example above) that do not qualify as medical examinations and may be lawful prior to a job offer (see discussion of physical agility tests, below).

Tests for illegal drug use are *not* considered "medical examinations" and may be required before a conditional job offer is made.¹⁷² Alcohol tests are considered medical examinations.¹⁷³

A general medical examination, unless subject to a specific exception based upon a bona fide occupational qualification(s), constitutes an impermissible pre-employment inquiry. Therefore, medical examinations must usually be limited in scope and focused upon an applicant's ability to safely perform the particular job for which he/she is applying.

Thus, if a pre-examination job offer is withdrawn based upon the results of a medical or psychological examination, *the employer* bears the burden of demonstrating that the criteria used to disqualify the applicant was job-related and consistent with business necessity.¹⁷⁴ In other words, the burden of justifying the scope and breadth of the medical or psychological examination falls on the employer.

Example: Following the submission of employment applications setting forth information about job applicants' previous employment and educational backgrounds, and language abilities, and subsequent in-person job interviews, applicants were given written conditional offers of employment. The written offer specified that it was contingent upon successful completion of a drug test, medical examination, and satisfactory background check, as well as an employment history verification and possible criminal history

¹⁷⁰ *Id.* at p. 11-12.

¹⁷¹ *Id.* at p. 12.

¹⁷² *Id.* at p. 14; see also T.A.M. at VIII-7.

¹⁷³ *Ibid.*

¹⁷⁴ Gov. Code, § 12940, subd. (e)(3); 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.14(b)(3)).

records check. Applicants were directed to immediately report for medical examinations during which they were required to provide written consent for a drug test, provide a urine specimen and list all medications they were taking at the time. Additionally, they completed medical history forms asking whether they ever had any of 56 listed medical conditions, including “blood disorder or HIV/AIDS.” Finally, nurses drew blood samples from the applicants. However, the applicants were not asked to provide written consent for the blood test and were not provided any notice about what types of tests would be performed on the blood sample. In response to a verbal inquiry, a nurse told one applicant that the airline would test for “anemia.”

None of the applicants revealed that they were HIV positive or listed the medications they were taking in conjunction with their status.

The airline used the blood samples obtained from the applicants to conduct CBC’s (comprehensive blood test) which revealed inconsistencies between the test results and responses provided by the applicants. Thus, the applicants’ physicians provided documentation of their HIV status and medication regime. Upon receipt of that information, the airline withdrew their conditional job offers on the ground that the applicants failed to be candid or provide full and correct information. The airline claimed that it evaluated all non-medical information collected in conjunction with its background check, etc., prior to evaluating the medical information it gathered about the applicants.

The airline violated the FEHA’s dictates concerning the sequence of employers’ hiring processes. The order in which information is collected is relevant, not the order in which it is evaluated.

An employer is required to either complete all non-medical components of its application process or demonstrate that it could not reasonably have done so prior to issuing the conditional job offer. “This two-step requirement served in part to enable applicants to determine whether they were ‘rejected because of disability, or because of insufficient skills or experience or a bad report from a reference.’” It also protects applicants who desire to keep their personal medical information private. Because the airline failed to adhere to the requirements of the FEHA, the applicants should not have been penalized for failing to disclose their HIV-positive status.¹⁷⁵

¹⁷⁵ *Leonel v. American Airlines, Inc.* (9th Cir. 2005) 400 F.3d 702.

The FEHA provides that when conditional offers of employment are based on the results of medical examinations and the examinations result in the disqualification of applicants, employers *must* permit employees to submit an independent medical opinion before a final decision on disqualification is made.¹⁷⁶ An employer's obligation to consider an independent medical opinion does not mean that an employer has an independent duty to inform applicants of their right to submit such opinions, but employers are encouraged to do so as a matter of good personnel practice.¹⁷⁷

The results of post-offer, pre-employment examinations must be treated as confidential medical records and stored/maintained as such.¹⁷⁸

b. Criteria for Permissible Post-Offer Inquiries and Examinations

Only post-offer inquiries and examinations which meet the following criteria are permissible:

- Job related;
- Consistent with business necessity; and
- Required of all entering employees in the same job classification, i.e., all applicants must be treated the same way by being asked the same questions or required to submit to a post-offer, pre-employment examination.¹⁷⁹

1) Job-Related

The qualification standard, test or other criterion used must measure the candidate's ability to perform the specific job to which the criterion is being applied, not a general class of jobs. It may relate to the essential or marginal functions of the position.¹⁸⁰

Examples of such criterion include, but are not limited to:

- a) Education
- b) Skills

¹⁷⁶ Cal. Code Regs., tit. 2, § 7294.0, subd. (d)(2).

¹⁷⁷ *DFEH v. General Dynamics* (1990) FEHC Dec. No. 90-06, at p. 12.

¹⁷⁸ Cal. Code Regs., tit. 2, § 7294.0, subd. (d). Confidential medical information regarding work restrictions and reasonable accommodations may be shared with supervisors and managers. Additionally, where appropriate, first aid and safety personnel may be informed that an employee's condition may require emergency treatment. (*Ibid.*)

¹⁷⁹ Gov. Code, § 12940, subd. (e)(3).

¹⁸⁰ T.A.M. at IV-2.

- c) Work experience
- d) Licenses or certification
- e) Physical or mental abilities
- f) Health and safety
- g) Other job-related characteristics such as good judgment, ability to work under pressure and meet deadlines, interpersonal skills, etc.¹⁸¹

2) Business Necessity

The FEHC describes “business necessity” as: Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact.¹⁸²

Any qualification standard, test or other criterion used must not disqualify a person with a disability because of his/her disability and must relate to the essential functions of the particular job in question.¹⁸³

Example: An employer asks candidates for a clerical job if they possess a valid driver’s license because the employer deems it desirable to hire an individual who can occasionally run errands for the employer such as taking packages to the post office in the event that no other employee is available to do so. The requirement is “job-related,” but applicable only to a marginal, not essential job function. Therefore, if the requirement serves to disqualify an individual who does not, because of a disability, possess a valid driver’s license, the requirement cannot be justified on the basis of “business necessity.”¹⁸⁴

¹⁸¹ T.A.M. at IV-5.

¹⁸² Cal. Code Regs., tit. 2, § 7286.7, subd. (b).

¹⁸³ *Id.* at IV-3.

¹⁸⁴ *Id.* at IV-4.

4. Physical Agility Tests

Many employers administer physical agility or fitness tests during the selection process. Key examples include organizations responsible for public safety.

*Example: A police department tests police officer candidates' ability to navigate an obstacle course designed to simulate chasing a suspect through an urban setting. Such test is a test of physical agility, rather than a medical examination.*¹⁸⁵

The FEHA does not specifically address the issue of physical agility tests, but all such tests are subject to the FEHA's guidelines regarding disability-related inquiries. Thus, physical fitness and agility tests are only appropriate when job-related, consistent with business necessity, and administered uniformly to all applicants entering the particular job category/classification. If the test screens out or tends to screen out individual(s) with a disability, the employer must, in order to justify the test's use, be prepared to demonstrate why the test is job-related, consistent with business necessity, and cannot be performed with a reasonable accommodation.

5. Post-Hire Inquiries and/or Examinations

Any disability-related inquiry and/or medical examination of a current employee must be job-related and based upon business necessity.¹⁸⁶ The circumstances under which such inquiries and/or examinations are allowed are narrow:¹⁸⁷

- a. In response to evidence of problems related to on-the-job safety or job performance (the examination must be job-related).

Example: An employee falls asleep on the job, has excessive absenteeism and exhibits other performance issues. An examination may be justified to determine if the employee's performance issues are being caused by an underlying medical condition, whether treatment is required and, if a disability is revealed, whether the employer must grant the employee a reasonable accommodation in order to perform the essential functions of his/her position.

- b. To determine current "fitness" to perform a physically demanding job (the examination must be job-related). This most often occurs when the employee has suffered an on-the-job injury.

¹⁸⁵ EEOC, Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations (10-10-95) at p. 12.

¹⁸⁶ T.A.M. at VI-1.

¹⁸⁷ *Id.* at VI-2.

Example: A warehouse worker suffers a work-related injury and is off work for a period of time. Before the employee may return to work, the employer may inquire as to whether or not the employee will return subject to any limitation(s) or need a reasonable accommodation. The employer may not demand that the employee remain off work until he/she is "100% cured" or impose any similar requirement. The employee may be required to demonstrate that he/she can lift the number of pounds mandated by the job description as an essential function of the position, but may not be required to submit to a blood test to determine if he/she is HIV positive since his/her HIV status is completely unrelated to the particular job in question.

- c. Voluntary responses conducted as part of employee health programs; provided by employees to identify themselves as individuals who need assistance entering or exiting the work premises for the purpose of developing emergency evacuation plans/procedure; or medical histories required to administer employee health programs available at the work site.¹⁸⁸

Any information about an individual's physical or mental condition or medical history that is obtained as a result of an employer's disability-related inquiry and/or medical examination must be treated as a confidential medical record and stored/maintained accordingly.¹⁸⁹

G. Essential Functions

Employment opportunities may not be denied to individuals with disabilities who are able to safely and effectively perform the "essential functions" of their particular job/position with or without reasonable accommodation(s). Thus, persons with disabilities may not be barred from or denied employment because they are unable to perform the marginal or "non-essential" duties of a job. As discussed above, the California Supreme Court imposes the burden upon DFEH to demonstrate that the complainant was qualified for the position he/she sought or held, meaning that he/she was able to perform the essential functions of the job with or without reasonable accommodation.¹⁹⁰

Essential functions are defined as "[t]he fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."¹⁹¹

¹⁸⁸ Gov. Code, § 12940, subd. (f); 42 U.S.C. § 12112 (d)(4)(B); 29 C.F.R. § 1630.14(d).

¹⁸⁹ 42 U.S.C. § 12112 (d)(4)(C); 29 C.F.R. § 1630.14(c).

¹⁹⁰ *Green v. State of California* (2007) 42 Cal.4th 254.

¹⁹¹ Gov. Code, § 12926, subd. (f); Cal. Code Regs., tit. 2, § 7293.8, subd. (g)(1).

A job function may be considered essential for any of several reasons, including, but not limited to one or more of the following factors:

1. The position exists to perform that function.

*Example: An individual is hired to proofread documents. An essential function of the job is the ability to proofread accurately since that is the sole reason the position exists.*¹⁹²

*Example: A company advertises for a “floating” supervisor to substitute when regularly assigned supervisors on the day, night, and graveyard shifts are absent. The only reason the position exists is to have a supervisor available to work any of the three shifts in any of the company’s various departments. Therefore, the ability to work at any time of the day or night is an essential function of the position.*¹⁹³

2. There are a limited number of employees available to perform the function, or among whom the function can be distributed.¹⁹⁴

*Example: It may be an essential function for a file clerk to answer the telephone if there are only three employees in a very busy office and each employee has to perform many different tasks. Or a company with a large workforce may have periods of very heavy labor-intensive activity alternating with less active periods. The heavy work flow during peak periods may make performance of each function essential, and limit an employer’s flexibility to reassign a particular function.*¹⁹⁵

3. A function is highly specialized, and the person in the position is hired for his/her special expertise or ability to perform the function.

*Example: A company creates a new sales position for the purpose of expanding its business in Japan. The position requires that the salesperson be able to converse fluently in Japanese. An essential function of the job is fluent communication in Japanese.*¹⁹⁶

¹⁹² T.A.M. at II-13.

¹⁹³ *Ibid.*

¹⁹⁴ This may occur for any number of reasons, e.g., the total number of available employees is low, or because the business faces fluctuating demands. For example, if a company has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform many different functions. The performance of those functions by each employee is critical and the options for reorganizing or redistributing work diminished. Under such circumstances, the courts could find that job functions that would not be essential if the staff were larger are indeed essential because the size of the staff is small when compared to the volume of work that must be done. (Appendix to 29 C.F.R. § 1630.2(n) (07-1-00), at p. 356.)

¹⁹⁵ T.A.M. at II-14.

¹⁹⁶ *Ibid.*

Determining the essential functions of a position is critical when an employee contends that he/she has been subjected to unlawful conduct because of his/her physical or mental disability. Evidence of whether a particular function is essential includes, but is not limited to, the following:¹⁹⁷

1. The employer's judgment as to which functions are essential.

Generally speaking, the courts will not second-guess an employer's judgment on matters such as production standards, the quantity of work that must be performed by a person holding a specific position, or the employer's quality standards. However, the employer's standards may not exist for the purpose of serving to discriminate against persons with disabilities.

*Example: An employer requires its typists to accurately type 75 words per minute. The employer must demonstrate that the requirement is not just "on paper," but, rather, that it actually requires employees to perform consistently at that level and the standard was not established for a discriminatory reason.*¹⁹⁸

2. Written job descriptions prepared before advertising or interviewing applicants for the job.

If there is a disparity between the two, anecdotal evidence of the functions actually performed by employees may be more relevant and carry more weight than written job descriptions.

*Example: An employer's written job description states that the employee must read temperature and pressure gauges and adjust machine controls to reflect those readings. However, in practice, the temperature and pressure are determined automatically, the machine is controlled by a computer, and the current employee either does not perform the stated functions at all or does so only very infrequently. The latter evidence of the functions currently performed by the incumbent will be deemed more relevant and accorded greater weight than the employer's outdated written job description.*¹⁹⁹

Example: A wholesale food distributor provides delivery services to its customers. The written job description for the position of "Deliveryperson" lists among the essential functions the ability to lift 100 pounds without an assistive device. The reason that verbiage appears in the job description is that the company offers for sale flour in 100 pound sacks. In the past, many customers purchased 100 pound sacks

¹⁹⁷ Gov. Code, § 12926, subd. (f); Cal. Code Regs., tit. 2, § 7293.8, subd. (g)(2).

¹⁹⁸ T.A.M. at II-15.

¹⁹⁹ *Id.* at II-16.

of flour which were delivered by the “Deliveryperson.” However, the incumbent asserts that in his 10 years of employment, none of his customers have ordered and he has never been required to deliver a sack of flour or any other item weighing more than 40 pounds. The company’s sales records reflect that, although the 100 pound sack of flour still appears in its catalogue, it has not sold that item to any customer on the incumbent’s assigned route in more than a decade. Therefore, the incumbent’s actual experience, coupled with the company sales records corroborating his statement, is more relevant than the written job description. A court would most likely reject the company’s argument that the ability to lift 100 pounds is an essential job function.

3. The amount of time spent on the job performing the function.
4. The consequences of not requiring the incumbent to perform the function.

The amount of time spent performing a function may be slight, but the consequences of not performing it great.

Example: *An airline pilot spends only a few minutes during each flight landing the aircraft. However, the ability to safely land an airplane is an essential function of the position of pilot because of the grave consequences that would flow from an incumbent being unable to perform the task.*²⁰⁰

Example: *A clerical employee is the only person who is in the company’s office throughout the day. Most of the day, the clerical employee is not alone in the office, but there are brief periods of time when he/she is the only one present. When other employees are in the office, they answer the telephone. However, when they are out, the clerical employee must answer calls, otherwise, they would go unanswered and sales might be lost. Answering the telephone is an essential function of the clerical employee’s position, even though he/she may not spend a significant amount of time during the day performing that function.*²⁰¹

5. The terms of a collective bargaining agreement.

Example: *A gas company employee argued that the employer’s job-bidding system subjected employees with disabilities to discrimination in*

²⁰⁰ *Id.* at II-17.

²⁰¹ *Ibid.* But note that the ability to perform an essential function must be analyzed with reference to any needed reasonable accommodation. Therefore, in this example, an employee who is deaf should not be automatically disqualified by the employer from the clerical position because he/she is unable to utilize standard/conventional telephone equipment. He/she may be able to perform if provided TTY equipment as a reasonable accommodation.

violation of the FEHA. The controlling collective bargaining agreement required employees to bid on positions before they became available and provided that vacant positions would be filled by the most senior qualified person on the bid list unless another bidder had priority. Employees on disability had priority if they were qualified and able to perform the duties of the position, but employees “in the path of layoff” were given preference over all other bidders, including employees with disabilities. The employee argued that employees with disabilities should have been granted bid priority over all other employees. The court held, however, that no such obligation is imposed upon an employer if it requires the employer to disregard the rights of other employees under a collective bargaining agreement. Moreover, an employer is not required to create new positions or “bump” other employees in order to accommodate an employee with a disability.²⁰²

6. The work experiences of past incumbents in the job.
7. The current work experience of incumbents in similar jobs.

See 2. above.

Example: *The complainant contended that she was denied a reasonable accommodation and terminated from her employment because of her physical disability (bilateral wrist tendonitis). She was employed in a candy factory as a “packer.” Her duties included “light production work” such as packing chocolate candy products into bags, boxes, caddies or containers as they came off the production line and placing those packed chocolate products onto pallets. Among the qualifications the employer listed were “hand dexterity” to manipulate candy bars, bags of candy and other productions emerging from high speed” production lines. Additionally, the employer required packers to be able to carry and lift “palletizing” boxes and caddies ranging in weight from 5 to 30 pounds. Packers were also expected to lift and/or carry weights of 18 to 30 pounds, 25 to 30 times per hour, push weights of 18 pounds, 10 times per hour, and pull weights of 10 pounds, 360 times per hour. The employer ran a number of different production lines and packers were expected to rotate between them each day. Inventory needs dictated which lines ran on specific days.*

The employer had “light duty” assignments available for injured workers, including packers. However, even the “light duty” assignments, which the employer viewed as only temporary until the injured employee was able to resume his/her regular duties, required that the employee lift products weighing more than 20 pounds on a daily basis.

²⁰² *McCullah v. Southern California Gas Co.* (2000) 82 Cal.App.4th 495.

Complainant had a significant history of treatment for her condition, including surgeries. She was eventually released to work, permanently restricted from lifting more than 20 pounds on an occasional basis. She had trouble performing routine household and personal hygiene tasks such as picking up a cup of coffee, combing her hair or brushing her teeth and was, thus, limited in the major life activities of caring for herself and performing manual tasks, per Government Code section 12926, subdivision (k).

The employer terminated her employment on the ground that the restriction did not comport with the essential functions of the position of packer. Thus, it was not disputed that complainant's employment was terminated because of her physical disability.

However, the FEHC found that lifting and carrying in excess of 20 pounds was an essential, not marginal, function of the position of packer. The evidence considered included the testimony on this point from the employer's Director of Operations and the complainant's immediate supervisor, which was corroborated by the employer's "1993 Inventory of Physical Demands," a 1993 job description requiring packers to lift and carry 18 to 30 pounds, 25 to 30 times per hour, without mechanical assistance. Additionally, complainant admitted that she could not perform the duties of packer required on at least seven of the company's production lines.²⁰³

H. The Interactive Process

Government Code section 12940, subdivision (n), provides that it is an unlawful employment practice:

[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

Thus, a separate violation of the FEHA occurs when an employer fails to engage in a timely interactive process with an employee or applicant after the employer learns that the employee has or may have a disability and is in need of a reasonable accommodation in order to perform the essential functions of his/her position.²⁰⁴ This is true even if it is ultimately determined that the employer is legally excused from providing the employee a reasonable accommodation.

²⁰³ *DFEH v. Ghirardelli Chocolate Company* (2003) FEHC Dec. No. 03-04.

²⁰⁴ *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 243 ["An employee may file a civil action based on the employer's failure to engage in the interactive process."]

The FEHA also makes clear that California offers broader protections than ADA and specifically emphasizes the interactive process:

The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.²⁰⁵

Federal courts have recognized that “the interactive process is a mandatory rather than a permissive obligation on the part of the employers under ADA and that this obligation is triggered by an employee or an employee’s representative giving notice of the employee’s disability and the desire for accommodation.”²⁰⁶ The Ninth Circuit described the interactive process as requiring “communication and good-faith exploration of possible accommodations between employers and individual employees with the goal of ‘identify[ing] an accommodation that allowed the employee to perform the job effectively.’”²⁰⁷

Example: A railroad terminated the employment of one of its engineers following a minor accident in which no one sustained serious injuries. The engineer admitted that he may have fallen asleep for a few seconds because he was a person with a physical disability (obstructive sleep apnea and narcolepsy), but the railroad had failed to provide him a reasonable accommodation and unlawfully terminated his employment.

The railroad argued that his employment was terminated for legitimate, nondiscriminatory reasons (his record of discipline, culminating in the accident). The engineer testified that he had informed his supervisor of his condition and asked for an accommodation – transfer to the position of yard master, a job he had performed before becoming an engineer. Alternatively, he asked to be transferred to the position of yard safety manager, clerk or assistant road foreman. He also testified that he made his supervisor aware that, because of his disability, he was afraid he would fall asleep and cause harm to someone. The supervisor refused the engineer’s request, telling him that he could not create a job for the engineer and did not have authority to take any action in response to his request. The supervisor admitted

²⁰⁵ Gov. Code, § 12926.1, subd. (e). [“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” (29 C.F.R. § 1630.2(o)(3) (2000).]

²⁰⁶ *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1114.

²⁰⁷ *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261, citing *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105.

knowledge of the engineer's condition, but thought there was no need for him to take action given that he had a release from his physician to return to his duties with no limitations. The railroad also argued that there was no reasonable accommodation available for the engineer in the operating department of the railroad. However, the undisputed evidence showed that the railroad employed over 56,000 employees in many different capacities.

An employer has no obligation to reasonably accommodate an employee who is otherwise not qualified for the position. The court must determine whether or not the engineer's misconduct (failure to control the engine) occurred because of the railroad's failure to participate in the interactive process. In other words, the engineer argued that but for the railroad's failure to engage in the interactive process and, ultimately, provide him with a reasonable accommodation, the accident would never have occurred. However, if the employee's misconduct was due to a reason other than the railroad's failure to provide a reasonable accommodation, the failure to engage in the interactive process would be of no legal consequence. For example, an employee whose employment is terminated due to embezzlement has suffered no discrimination because the employee failed to engage in the interactive process, i.e., the employee is otherwise not qualified for the employment. Among the reasons offered by the railroad for the accident were 1) a deliberate act by the engineer; 2) a momentary lapse of judgment by the engineer unrelated to his disability; or 3) the engineer's failure to comply with his physician's orders which led to an exacerbation of his symptoms and, in turn, the accident. The trial court must resolve the factual dispute.²⁰⁸

Example: The complainant, a heavy-equipment operator diagnosed with epilepsy at the age of 16, controlled his condition with medication but experienced an occasional seizure. He could predict when a seizure would occur because of the preceding "aura" ("akin to a nervous jerk," an aura is a sign that a seizure may occur that day, usually within one hour). The complainant experienced seizures following an aura approximately fifty percent of the time.

Despite experiencing an aura in the morning, the complainant reported for work. He did not report the aura to his superiors. Later that day, he suffered a seizure which caused him to become unconscious while driving a company pickup. He was traveling at a low enough rate of speed that his passenger/co-worker was able to take control of the vehicle and stop it.

Following that incident, the complainant was required by his employer to submit to a medical examination. The examining neurologist concluded that

²⁰⁸ *Daniels v. Union Pacific Railroad Company* (2006) 2006 WL 61896. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

the complainant was not able to work safely in high places or around moving machinery where a loss of consciousness would endanger the complainant or others. The complainant's employment was terminated on the ground that he could not perform the essential functions and duties of his position without posing a safety threat to himself and others. Since the complainant admitted experiencing the aura but still proceeding to work, he was found to have "acted irresponsibly, recklessly, and with a total disregard of the safety of himself, other employees, and members of the public." The complainant claimed that he was subjected to unlawful discrimination because of his physical disability and denied a reasonable accommodation.

The court rejected the employer's assertion that the complainant's employment was terminated for a legitimate, nondiscriminatory reason, pointing to the employer's own correspondence. The employer advised the complainant in writing that his employment was terminated because he could not "perform the essential functions and duties of the job . . ." and the employer's "concerns regarding your medical condition . . ." Additionally, the employer referenced his "poorly controlled idiopathic epilepsy" and the medical examiner's belief that his condition "prevent[ed him] from performing [his] duties. . . ." Nowhere in any of the employer's writings was the complainant's driving the pickup despite having experienced the aura referenced as a reason for the termination, however, when he appealed the action to the Board of Supervisors, it stated that was the reason for the termination. Therefore, the employer contended it was the "only legally relevant reason." Additionally, six other employees who had accidents in company vehicles were not disciplined.

"With few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." Therefore, the explanation offered by the Board was neither legitimate nor nondiscriminatory. A complainant's disability or request for reasonable accommodation may not serve, even in part, as the motivation for an adverse action.

*The employer had an affirmative obligation to engage in the interactive process to ascertain whether it could grant the complainant a reasonable accommodation.*²⁰⁹

EEOC describes it as follows:

The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

²⁰⁹ *Dark v. Curry County* (2006) 451 F.3d 1078.

The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, he/she does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.²¹⁰

EEOC recommends that employers adopt a problem-solving approach to the interactive process:

1. Analyze the particular job involved and determine its purpose and essential functions;
2. Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
3. In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4. Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his/her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

²¹⁰ EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, page 11-12.

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.²¹¹

The courts emphasize that the interactive process is only effective when “[b]oth sides . . . communicate directly, exchange essential information and neither side can delay or obstruct the process.”²¹² Further, when an employee or applicant claims that an employer has failed to provide him/her with a reasonable accommodation, the court must “isolate the cause of the breakdown” of the parties’ communications.²¹³ This is because the “interactive process is at the heart of” the reasonable accommodation process and serves as the “primary vehicle for identifying and achieving effective adjustments which allow . . . employees [with disabilities] to continue working without placing an ‘undue burden’ on employers.”²¹⁴

Example: In the case of the fleet sales manager who sought to return to his duties following further amputation of his left leg (discussed above), the FEHC held that the employer failed to engage in the interactive process, thereby violating Government Code section 12940, subdivision (n). The duty to begin the interactive process was triggered when the employee submitted his medical release. Eight months elapsed between the employee’s submission of his medical release and the employer’s offer to return him to work after he had been released to work full-time, during which time there was no attempt by the employer to initiate the interactive process to ascertain what accommodation the employee actually needed. The belated offer to return the employee did not relieve the employer of its statutory duty to engage in a timely, good faith, interactive process as is required by the FEHA.²¹⁵

Example: In the case of the police officer, discussed above, who was diagnosed with major depression and released to return to work in a position that did not require him to carry a weapon, the officer requested that he be allowed to transfer, as a reasonable accommodation, to a vacant position in the radio room. The police department did not respond in any way to his

²¹¹ Appendix to 29 C.F.R. § 1630.16 (2000) at p. 364-65.

²¹² *Ibid.*, citing *Barnett* at 1114-1115, fn. omitted.

²¹³ *Ibid.*

²¹⁴ *Id.* at 262-263.

²¹⁵ *DFEH v. Ford of Simi Valley, Inc. dba Simi Valley Ford* (2005) FEHC Dec. No. 05-05.

request until the complainant commenced litigation. Rather, the police department advised the complainant that he had exhausted his leave credits and suggested that he apply for a medical leave of absence. Despite the department's awareness of his need for ongoing treatment for major depression and stress management, it advised him that when he completed "all" of his medical treatment and received authorization from his physician to carry a weapon, he would be restored to "patrol duty." When he declined to request a medical leave of absence, his employment was terminated.

The police department failed to respond in good faith by complying with its obligation to engage in a meaningful interactive process for the purpose of ascertaining a reasonable accommodation. The numerous ways that an employer can respond in good faith include, but are not limited to, meeting with the employee, requesting additional information about his/her limitation(s), asking for clarification about the specific accommodation the employee seeks, providing feedback to the employee indicating that his/her request has been duly considered, offering or discussing alternative forms of accommodation if the form requested by the employee is not feasible. By failing to engage in the interactive process in any meaningful manner, the police department assumed the risk that it overlooked an opportunity to provide a reasonable accommodation to an employee with a disability.²¹⁶

The interactive is an *ongoing* one, rather than simply an isolated meeting or written communication between the employer and employee. Any change in circumstances, whether related to the employee's condition or the work environment, e.g., shift, tool, equipment or workstation changes, may trigger the employer's obligation to recommence the interactive process if the employee informs the employer that the accommodation initially provided is not effective or that fact is readily apparent to the employer. If it has no knowledge of the employee's need a reasonable accommodation, the employer has no obligation to provide one.²¹⁷

Example: A medical transcriptionist with a stable and exemplary work record began missing work altogether or being tardy frequently. After receiving several warnings from her employer, she was diagnosed with Obsessive-Compulsive Disorder (OCD) which caused her to engage in obsessive rituals, repeatedly check and recheck things, etc. As a result of the behaviors caused by the disorder, it was difficult for her to get to work on time. Realizing that she would be late, she would panic and "become embarrassed, making it even more difficult for her to leave her house and get to work." The complainant's treating physician advised her employer that OCD was "directly contributing to her problems with lateness."

²¹⁶ *Williams v. Philadelphia Housing Authority Police Department* (2004) 380 F.3d 751.

²¹⁷ *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1384-85. [The employer must grant a reasonable accommodation only for the "known physical or mental disability of an applicant or employee."]

Following an interactive process, the complainant was granted a flexible start time, but she continued to miss work. The employer did not further the interactive process for the purpose of modifying the accommodation or devising an alternate one. However, the complainant requested that she be able to work from home. Her request was summarily denied on the ground that any employee subject to disciplinary action was prohibited from doing so. In fact, the employer's policy was that an employee must have no attendance problems for a full year before being considered for an at-home transcriptionist position. The complainant claimed that she requested a medical leave of absence which was denied. When her employment was terminated because of her history of tardiness and absenteeism, she brought suit.

The court found that a leave of absence would have been a reasonable accommodation and that the complainant was not required to show in advance that a leave would have been successful. Working at home was another plausible accommodation that should have been explored fully because it is impermissible for an employer to deny a reasonable accommodation on the basis of an employee's disciplinary record. The employer had an affirmative obligation to explore further methods of accommodation when the first method selected, the flexible start time, did not accomplish the goal of allowing the employee to perform the essential functions of her position.

The duty to provide an accommodation "is a 'continuing' duty that is 'not exhausted by one effort.'" If one form of accommodation is not effective, the employer must consider alternative means of accommodation. "Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the [statute], by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective." Because the employer denied the complainant's request for a modified accommodation with discussing any alternative solutions, it violated its duty regarding the mandatory interactive process.²¹⁸

The duration and breadth of the interactive process will be determined by the specific circumstances. However, the employer must be actively involved. In other

²¹⁸ *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128. See also *Barnett* at p. 1116-17 [An employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives.].

words, in instances where the employee seeks to transfer to a vacant position, the courts have held that simply referring the employee to a job bulletin board, employer-maintained intranet website or other location where job openings are posted does not fulfill the employer's obligation.

Example: An employee in a bank branch office suffered from post-traumatic stress disorder ("PTSD") following an attempted violent robbery. As a result, she was limited in the life activity of working because she could no longer work as a manager or in any capacity in a branch office. She made her employer, Wells Fargo Bank, aware of her condition and requested a reasonable accommodation. She applied for many other positions with the bank, but was not selected for any of them. She learned about available positions via the bank's periodic listing of open jobs, which she did not receive regularly – she had to call in and request that a copy be sent to her. The bank failed to engage in the interactive process. Merely offering an employee the opportunity to apply for other positions, a right he/she already possesses, does not constitute an interactive process designed to arrive at a reasonable accommodation. The two-way interactive process requires more. Employees do not have the employer's "superior knowledge" about the workplace, the availability of alternative positions, the qualifications they require, etc. The employee was wrongfully "expected to identify possible reassignments from Wells Fargo's job listings on her own, and . . . the company liaisons made little effort to identify which, if any, of the vacant positions met her limitations and qualifications or could be altered to accommodate her." It was unreasonable to place the entire burden of locating an alternate position which would constitute a reasonable accommodation upon the employee. ²¹⁹

The obligation to engage in the interactive process extends to persons whom the employer *perceives* to have a physical or mental disability.

Example: In the case discussed, the complainant suffered an on-the-job injury from which he recovered, underwent training and was offered a position as a fabricator. The job offer was withdrawn when the employer reviewed his file containing restrictions imposed by his treating physician.

The employer's Placement Review Committee considered whether a reasonable accommodation could be devised that would allow the complainant to perform the essential functions of the fabricator position. However, after considering the input received from the manager of that department and the in-house physician, as well as reviewing the medical documentation available to it, the Committee determined that no accommodation was possible. Additionally, it concluded that there was no other available position within the complainant's job classification that could be offered to the complainant. The Committee chair, senior manager of the employer's equal employment opportunity programs, notified the complainant

²¹⁹ *Id.* at 265.

in writing of the Committee's decision and "invited [him] to notify [the employer] if he became aware of a reasonable accommodation that would permit him to perform the essential functions of a fabricator, consistent with his medical restrictions."

The complainant requested that the employer reconsider its decision, emphasizing that he had completed the fabricator training without reinjury, his doctor agreed that the previous restrictions were no longer applicable, and he was presently performing the same physical functions in his employment as a fabricator with another company. The employer maintained that the complainant's restrictions precluded him from performing the essential functions of the position and no reasonable accommodation was available.

When the complainant filed suit for violation of the obligation to engage in an interactive process, the employer argued that it owed the complainant "no duty to engage in a 'futile' discussion with an applicant or employee who is merely 'regarded as' disabled or to whom no duty or reasonable accommodation is or will be owed." The court rejected the employer's reasoning, noting that the "duty to engage in a discussion may be more compelling in the context of the interactive process" than is the obligation to actually provide a reasonable accommodation. The purpose of the interactive process is to "bring the two parties together to speak freely and to determine whether a reasonable, mutually satisfactory accommodation is possible to meet their respective needs."

*Thus, a failure to engage in the interactive process is a violation of the FEHA whether the applicant or employee in question is actually or is perceived as being a person with a disability.*²²⁰

The employee must also participate in the interactive process and cooperate with the employer's efforts to devise and implement a suitable reasonable accommodation. "It is an employee's responsibility to understand his/her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee."²²¹ Moreover, an employee seeking accommodation cannot refuse to talk with the employer's representatives who are attempting to establish a reasonable accommodation for the employee.

Example: *An employee with a disability (thoracic outlet syndrome) requested that the thermostat in the workplace be raised to specific level as a reasonable accommodation. Unfortunately, that level would make the workplace uncomfortably warm for other employees and customers. The employer requests that the employee participate in the interactive process by meeting with members of the employer's reasonable accommodation*

²²⁰ *Gelfo v. Lockheed Martin Corporation* (2006) 140 Cal.App.4th 34.

²²¹ *Id.* at 266.

committee to discuss feasible alternative means of accommodation. For instance, the employer has suggested that it might move the employee to a different work station where the thermostat could be set at the requested temperature without impacting others or provide the employee with a portable space heater. The employee refuses to participate, despite the employer's several requests, instead demanding that the accommodation she has requested be implemented, stating "there is nothing to discuss. Just accommodate me, please!" There is no violation of the FEHA by the employer because it has attempted to comply with its obligation to engage in the interactive process, but the employee has obstructed the process.

Example: An employee was promoted by the school district that employed her from the position of custodian to that of plant supervisor. However, she did not succeed in that position and was demoted back to her original job. She contended that the demotion constituted a failure by the district to provide her a reasonable accommodation for her physical disability about which the district had knowledge. However, the employee acknowledged that she received a letter from the district's personnel representative in which she was offered a reasonable accommodation by the district which would have allowed her to perform the essential functions of the custodian position. She chose not to respond to the letter and did not accept the reasonable accommodation that was offered. The court held that the district did not violate the FEHA. An employer can rebut a claim that it has failed to engage in the interactive process and provide a reasonable accommodation by establishing that an accommodation was offered and refused.²²²

Example: A staff nurse in the surgery department of a hospital develops abnormal blood vessels in her eye that are prone to breaking and leaking. She undergoes surgery to stop the hemorrhaging (bleeding) in her eye and recuperates, but returns to work with restrictions imposed by her ophthalmologist: She may not engage in straining, heavy lifting, bending so that her head is below heart level, sneezing or coughing. She requested that she be reasonably accommodated, and participated in two meetings with the hospital's personnel representatives, but thereafter rejected a formal offer from the hospital to be transferred to the position of scrub nurse. She also failed to respond to the hospital's written reiteration of that offer. Thus, the court found that her silence in the face of the hospital's offers of accommodation effectively cut off any possibility that the parties could continue the interactive process. In so doing, the nurse also precluded any possibility that the court could find the hospital failed to reasonably accommodate her. Liability will not be imposed upon the employer when it is not responsible for obstructing the informal interactive process but, rather, makes reasonable efforts to communicate with the employee and provide

²²² *Baker v. El Dorado Union High School District* (2005) 2005 WL 1427725, citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

*reasonable accommodations based on the information available to the employer in the face of employee actions which cause a breakdown in the interactive process.*²²³

Example: *An employee at a veterinary school of medicine developed leptospirosis, a disease that can spread from animals to humans with flu-like symptoms. Thus, he was precluded from working in any environment where there was a possibility he could contract an infection. The employee retained an attorney and refused to communicate directly with his employer, insisting that all communication take place via his counsel. An employee may not ordinarily require his/her employer to communicate solely through the employee's attorney because the interactive process requires that the employer and employee communicate directly with each other to exchange information about the employee's job skills and qualifications, and positions which are available. The kind of information that the employer seeks to elicit through the interactive process is personal to the individual employee. Thus, forcing the employer to communicate through counsel will slow the interactive process and frustrate the employer's attempts to comply with the FEHA.*²²⁴

The employer is not obligated to engage in an interactive process if the employee's request for accommodation is untimely, i.e., made after his/her employment has been terminated.

Example: *The complainant was employed by a computer manufacturing firm as a senior wireless engineer. He became unable to work because of a mental disability. While he was on a protected leave from his duties, the division in which he was employed was reorganized due to business conditions and his position was eliminated. Although the decision was made in March and the appropriate paperwork signed by the employer's immediate supervisor and the human resources representative in April, the employer failed to notify the complainant. In July, the complainant's psychologist released him to return to work part-time with limitations effective August 4. Upon receipt of the release, the employer discovered its error. By letter dated*

²²³ *Bryant v. Caritas Norwood Hosp.* (2004) 345 F.Supp.2d 155.

²²⁴ *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, review denied.

[In this unusual case, the court refused to hold as a matter of law that the employee's request that all communication be via his attorney was unreasonable. The employer had informed the employee on four occasions that his employment was terminated; therefore, it was reasonable for the employee to believe his legal status was uncertain and seek specialized advice and assistance from an attorney. Moreover, when the employer's personnel representative attempted to contact the employee's attorney and learned that he was with a law firm that specialized in workers' compensation law, the representative determined that, since the employee did not have a pending workers' compensation claim, she was not obligated to communicate with the attorney. The court found that the unusual circumstances, created by the employer, created a triable issue of fact as to whether the employer engaged in the interactive process in good faith.]

July 24, the employer notified the complainant that his employment would be terminated effective August 7.

*The complainant claimed that the employer failed to engage in the interactive process and grant him a reasonable accommodation. However, the court concluded that the employer demonstrated a legitimate, nondiscriminatory reason for its termination of his employment, i.e., the reorganization motivated by business conditions. Moreover, even though the employer neither timely notified the complainant nor processed the related paperwork, the facts demonstrated that it made the decision to eliminate the complainant's position in March. Complainant did not request accommodation until July, four months after the decision to terminate his employment had been made. Therefore, at that time, the employer had no obligation to engage in the interactive process because it had already decided to terminate the complainant's employment for legitimate, nondiscriminatory reasons.*²²⁵

I. Reasonable Accommodation

"Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship."²²⁶

A failure to provide reasonable accommodation for an employee with a physical or mental disability constitutes a separate violation of the FEHA.²²⁷ Government Code section 12940, subdivision (m), states that it is an unlawful employment activity:

[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

Thus, California law makes clear that the provision of a reasonable accommodation is an affirmative obligation imposed upon employers.

²²⁵ *Astrin v. Apple Computer, Inc.* (2006) 2006 WL 3335315. [The court also found that the employer had met its burden to show that there was no vacant position within its organization for which the complainant was qualified and capable of performing with or without accommodation. Therefore, it did not violate the FEHA by failing to provide the complainant a reasonable accommodation. Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

²²⁶ Cal. Code Regs., tit. 2, § 7293.9.

²²⁷ *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, reh'g. den., review den.

A reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment itself that makes it possible for an individual with a disability to enjoy an equal employment opportunity.²²⁸

The FEHA's two-part focus on reasonable accommodation – accessibility and modification of job requirements and examinations – highlights the key objectives of reasonable accommodation. Reasonable accommodation is designed to:

- Ensure equal opportunity in the job application process;

Example: An individual who utilizes a wheelchair may need an accommodation to participate in an employment examination or interview. If the examination or interview is scheduled to be conducted on the second floor of a building that does not have an elevator, the employer will need to move the examination or interview to a ground floor location or another building which does have an elevator.

Example: An individual with a visual disability may need to be provided with job application or examination materials printed using a large font.

- Enable an individual with a disability to perform the essential job functions; and
- Ensure equal enjoyment of the "terms, conditions, and privileges" of employment.²²⁹

Example: Employees with disabilities must be afforded equal access to lunchrooms, employee lounge areas, restrooms, meeting rooms, and all other employer-provided or sponsored services such as health programs, transportation and social events.

The courts which have looked at this issue have emphasized that reasonable accommodation embodies an affirmative duty not only to remove the barriers facing employees with disabilities, but to actively restructure the work environment to ensure equal treatment and assist an individual to perform the essential job functions.²³⁰ The focus of reasonable accommodation is on the preservation of an individual's employment status and the opportunity to enjoy " . . . the privileges of employment."²³¹

²²⁸ T.A.M. at III-1.

²²⁹ *Id.* at III-2.

²³⁰ See discussion of the broad affirmative duty to reasonably accommodate in *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935.

²³¹ *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal.App.3d 1541, 1555.

A reasonable accommodation must be an *effective* accommodation.²³² However, “[t]he employer is not obligated to choose the best accommodation or the accommodation the employee seeks,”²³³ i.e., the employee is not entitled to the accommodation that he/she deems ideal. If there are two reasonable accommodations available, one of which more costly or burdensome than the other, the employer may choose the less costly or burdensome accommodation so long as it is effective.

Similarly, an employer may select the accommodation that is easiest to provide from among two or more which are effective. When more than one accommodation is effective, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.”²³⁴

Example: An employee with a visual impairment provides her employer with medical documentation supporting her need for a large computer monitor at her assigned work station. Specifically, the doctor has directed that she be provided the largest monitor “available,” but it must be at least 19” in diameter. The employee has requested that the employer provide a flat screen monitor, but the employer has decided to purchase a traditional (non-flat screen) monitor which is 21” in diameter for her use. Has the employer violated the FEHA? No. The employee is entitled to receive a “reasonable” accommodation. Flat screen monitors are considerably more expensive than traditional models which provide the same functionality. The employer has fully complied with the doctor’s specification that the employee’s work station be equipped with a monitor at least 19” in diameter. The employee is not entitled to receive an ideal, perfect or “state of the art” accommodation. Rather, the employee is entitled to receive the accommodation that will allow her to perform the essential functions of her position effectively.

Example: A “sack handler” is required to move 50 pound sacks from a loading dock to the storage room. He has a physical disability (post-herniated disc surgery) and lifting restrictions, so he requests a reasonable accommodation. The employee and employer engage in the interactive process for the purpose of exploring reasonable accommodation. Clarification received from the employee’s physician reveals that he can lift the 50 pound sacks but only to waist-level. Therefore, he cannot carry them to the storage room. There are several ways that the employee’s physical disability can be accommodated: He could use a dolly, a hand-truck, or a motorized cart. The employee requests that the employer purchase a

²³² T.A.M. at III-3.

²³³ *DFEH v. California Department of Corrections* (2003) FEHC Dec. No. 03-08 at p. 14, citing *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 218.

²³⁴ 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

motorized cart for his use. However, the employer's research reveals that the cart is significantly more expensive than a dolly or hand-truck, so the employer advises the employee that it will be purchasing a hand-truck for his use. The employee becomes enraged and walks off the job, telling the employer that he will only return when the employer provides him with the motorized cart. When the employee fails to report to work for five consecutive days, the employer terminates his employment on the ground that he violated the employer's internal policy concerning job abandonment. Did the employer violate the FEHA? No. The employee has no right to demand that the employer provide the accommodation he prefers. The employer was ready, willing and able to provide the employee with a reasonable accommodation that would enable him to perform the essential functions of his position. The employer is required to do no more under the law.²³⁵

An employer will be found to have complied with its legal obligation to provide a reasonable accommodation if it offered the employee the opportunity to transfer to the only available (vacant) position for which he/she is qualified, even if the transfer constitutes a demotion and/or reduction in pay, benefits and/or hours worked.

Example: The complainant, a "career flight attendant" could no longer, due to medical restrictions, perform the essential functions of that position. As a reasonable accommodation, the airline offered her a part-time clerical job, the duties of which were consistent with her limitations on major life activities. The complainant alleged that the airline failed to reasonably accommodate her disability, but the court disagreed finding that she was no longer qualified for the position of flight attendant. In light of that fact, the airline had no duty to create a new, indefinite temporary assignment as an accommodation (see further discussion of light duty below), nor was it required to permit the complainant to take repeated leaves of absence when she was qualified for and capable of performing the essential functions of the clerical position. The airline complied with the FEHA.²³⁶

1. Examples of Reasonable Accommodation

Examples of reasonable accommodation include, but are not limited to:²³⁷

- a. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities
- b. Job restructuring – reallocating or redistributing marginal job functions

²³⁵ T.A.M. at III-11.

²³⁶ *Salisbury v. Delta Air Lines, Inc.* (2005) 126 Fed.Appx. 368. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

²³⁷ Gov. Code, § 12926, subd. (n); Cal. Code Regs., tit. 2, § 7293.9, subd. (a).

c. Reassignment to a vacant position

An employer is not required to create a new job, move another employee, promote the employee with a disability, or violate another employee's rights under a collective bargaining agreement to reassign the employee with a disability.²³⁸ Rather, the employer has a duty to reassign an employee with a disability if an already funded, vacant position at the same level exists.²³⁹

An employer should not only direct the employee to seek suitable jobs, but should also actively search for jobs for the employee and consider other forms of reasonable accommodation.²⁴⁰

An employer must first attempt to provide a reasonable accommodation to an employee with a disability which will enable the employee to remain employed in his/her current position. Only if an employee's disability cannot reasonably be accommodated in his/her existing position, the employer must reassign him/her to a position in which his/her disability can be accommodated unless "there simply was no vacant position *within the employer's organization* for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation . . ."²⁴¹ An employer should, however, consider jobs that will become available for the employee within a reasonable period of time, not just those immediately available. Furthermore, an employee with a disability who is being accommodated by reassignment to another position should be given preferential consideration over employees who are more qualified or have more seniority, so long as the employee with the disability is also qualified for the position.²⁴²

²³⁸ *DFEH v. Ghirardelli Chocolate Company* (2003) FEHC Dec. No. 03-04 at p. 18, citing *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376.

²³⁹ *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389.

²⁴⁰ *Id.* at 1389-90.

²⁴¹ *DFEH v. County of Riverside* (2006) 2006 WL 724533 at p. 5, citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.] The obligation to transfer an employee with a disability to a vacant position may require the employer, in the absence of a position at the employee's same grade or level, to offer the employee a position at the highest available grade, classification or pay level, or a level below the employee's current grade, classification or level. The employee may also voluntarily obtain reassignment to a lower level position in order to receive a reasonable accommodation of his/her disability. "If an employer's only duty were to reassign a disabled employee to a position involving the same duties and responsibilities he already cannot perform due to his disability, the right of reassignment would mean nothing." (*Id.* at p. 7, citing 29 C.F.R., part 1614.203(g) (1996).)

²⁴² *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 265. The employer is *not*, however, required to violate the terms of a collective bargaining agreement in order to provide a reasonable accommodation to an employee with a disability.

Example: A probationary candidate for the position of correctional officer suffered knee injuries while running and was unable to complete the peace officer academy training course. His injuries were caused by a degenerative joint disease in both knees which was determined to be a permanent condition making him unable to meet the physical training requirements of the academy. He could not run, could not walk more than a few yards without using a cane, required a knee brace to stand for any extended period of time, could not climb up or down stairs without severe pain, and was “generally immobile.” His physician released him to work in any capacity other than as a peace officer cadet, prompting him to request an accommodation such as modified duties or employment in an alternate position such as computer data entry.

The California Department of Corrections (CDC) rejected him from probation on the ground that he could not perform the essential functions of the position of correctional officer, citing the offer of employment it extended to him “contingent upon [his] successful completion of the remaining phases of the selection process” including the physical abilities test.

The court held that CDC neither discriminated against nor wrongfully failed to reasonably accommodate the candidate. The candidate was unable to show that he was qualified for the position for which he sought accommodation; it was undisputed that he did not satisfy the prerequisites for permanent appointment to the position. Moreover, the candidate’s employment status was a major factor in the court’s decision. The candidate was only extended a conditional offer of employment and was not, therefore, entitled to reassignment to another position with different qualifications within CDC.²⁴³

An employer also has no obligation to create permanent light duty work for an employee with a disability as a reasonable accommodation.²⁴⁴

Example: A customer service representative for a company that provided uniform rental, sales, laundry services, and building maintenance products was injured on-the-job. Specifically, he injured his wrist while lifting a rack of uniforms and was thereafter unable to

²⁴³ *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963. The Court’s discussion included analysis of the State Civil Service System and the fact that the candidate had not competed for a position in a different class of civil service employment, thereby precluding the CDC from transferring him rather than requiring him to compete in the civil service examination process.

²⁴⁴ *DFEH v. Ghirardelli Chocolate Company* (2003) FEHC Dec. No. 03-04, fn. 9 at p. 18, citing *McCullah v. Southern California Gas Co.* (2000) 82 Cal.App.4th 495, 501; *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th at 1389.

perform the heavy lifting, including loading and unloading uniforms and garment racks at the 35 or so customer stops along his assigned route. Customer sales representatives generally worked alone, although assistants were sometimes assigned to ride along on a temporary basis. Additionally, customer sales representatives were sometimes assigned to make special deliveries (specials) in addition to completing their regular route. The undisputed evidence showed that 90% of specials were handled by the customer service representative assigned to the route on which the customer requiring the special delivery was located. Therefore, the company had no full-time position for a customer service representative who handled only specials.

After the employee was injured, he was assigned for a brief period of time to deliver specials and perform telephone duties while continuing to receive the same rate of pay that he earned as a customer service representative (10% commission from the revenue generated on his route). However, the employer informed the employee that the arrangement could not continue and, since there were no other vacant positions for which the employee was qualified, he was offered a telephone position at a lower rate of pay, which he declined, arguing that the employer violated the FEHA by not offering him a full-time position as a specials driver. The employer demonstrated that there was no existing position involving only specials deliveries.

The employer was not required to create a new position in order to accommodate the employee. The employee's contention that the employer should have provided him with a full-time assistant on his route was rejected for the same reason. Assistants were assigned on a temporary basis periodically, not permanently. By and large, customer routes were serviced by customer service representatives working alone.²⁴⁵

Example: A police officer, employed for 21 years, served as a school resource officer for the local school district. In that capacity, he patrolled school campuses when school was in session and worked as a street patrol officer during school breaks. He suffered an on-duty injury (torn meniscus) which made it difficult for him to run, jump, kneel or lift.

The police department assigned him to a temporary light-duty position at the department's front desk. The undisputed evidence showed that the front desk position was permanently staffed by "police technicians" who were classified as non-peace officer civilian employees. They received substantially lower salaries and fewer benefits than sworn peace officers. Additionally, the front-desk position was reserved as a temporary light-duty assignment for police officers recovering from

²⁴⁵ *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821.

injuries and, from time to time, non-injured police officers would fill in temporarily when police technicians were either unavailable or needed assistance from a police officer with a particular task.

Nonetheless, the employee remained in the front-desk assignment for six years, during which time the department hoped that his condition would resolve such that he could return to peace officer duties. When the employee's physician opined that his condition would not improve and he could never again perform the essential functions of a patrol officer, the department arranged a job analysis for the purpose of determining whether an effective reasonable accommodation could be implemented. At the time, there were no available positions for a sworn police officer with the employee's qualifications and physical limitations.

The employee made clear that he would not accept the front-desk position on a permanent basis if he was required to demote to civilian status with lower pay and fewer benefits, particularly since, if he did so, he would forfeit his police retirement. The employee contended that the department failed to provide him with a reasonable accommodation when it refused to allow him to continue performing front-desk duties while retaining his police officer status, pay and benefits.

The court found that no violation of the FEHA occurred. The department was not required to transform the employee's temporary assignment into a permanent position because that would effectively require the department to specially create a new sworn-officer position for the employee. The FEHA does not impose such an obligation upon employers.²⁴⁶

d. Part-time or modified work schedules

Example: *A fleet sales manager for a car dealership was forced to undergo further amputation of his left leg.²⁴⁷ Thus, he was a person with a disability. He was assured in writing by his employer concerning his future employment: "Make no mistake Joe we will*

²⁴⁶ *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215. The court commented: "[The] FEHA does not require the employer to create a new position to accommodate an employee, *at least when the employer does not regularly offer such assistance to disabled employees* [emphasis added]." The court left open the possibility that an employee could allege discrimination in the event that the employer has a demonstrated pattern or practice of creating new positions in order to accommodate employees with disabilities but elects not to accommodate that particular employee.

²⁴⁷ The employee initially underwent surgery to amputate his left leg below the knee and resumed work on a part-time basis until he was released to work full-time. Thereafter, he had additional surgery to extend the amputation above his knee. In the intervening period, the car dealership came under new ownership.

have a position in our sales department available to you when you can return to work full-time with a doctor's release." Upon receipt of his employer's letter, the employee advised the employer that he was not yet released to work full-time because his physician opined that he needed some time to regain his stamina. Therefore, the employer assured him that if he was released for part-time work, he could resume his duties.

Approximately one month later, he informed his employer that he was released to return to work a maximum of four hours per day maximum three days per week, with walking limited to coming to and leaving work. He was still being fitted for a prosthetic device for his left leg, but was mobile using a walker or crutches, could get up and down stairs, and was able to drive vehicles with automatic transmissions. The employer refused to allow the employee to return to work until he was released by his doctor to work full-time and able to "complete a sale from start to finish." The employer told the employee that he was "disruptive to other employees" and, later that same day, added verbiage to the employee's medical release: "Cannot return until he can complete a sale from start to finish. Needs to be able to drive, deliver, and show customers all workings. Be able to walk the lot, demo cars and move from F&I office to necessary areas to complete sale." The employer did not discuss the above requirements with the employee, seek a further medical opinion about the employee's condition or take into account that the employee could use a walker or wheelchair under the terms of his doctor's directive, and appointed another individual to serve as fleet sales manager.

The FEHC held that the employer violated the FEHA by failing to grant the employee the accommodation he requested. At a minimum, the employer was obligated to consider the employee's request on an individualized basis to determine if it was reasonable. In light of the size of the employer's sales staff, history of having permitted the employee to work part-time following his first amputation surgery, and history of business practices that would have allowed employee to enlist the assistance of other sales personnel for which he would split sales commissions with him, the employer's "outright denial of [the employee's] request for accommodation constituted a failure to reasonably accommodate" him.²⁴⁸

Example: *A licensed vocational nurse (complainant) was diagnosed with breast cancer for which she underwent surgery,*

²⁴⁸ *Dfeh v. Ford of Simi Valley, Inc. dba Simi Valley Ford* (2005) FEHC Dec. No. 05-05 at p. 16.

chemotherapy and radiation treatment. Her employer, a health services provider, operated two “campuses.” The complainant worked at the campus located 60 miles from her residence, while the other campus was only four miles from her home. Her employer was aware, when she returned to work on a part-time basis, that her stamina and immune system were both compromised, impacting her ability to perform her duties adequately. Her employer was also aware that by the time complainant completed her 12-hour shifts, she was so exhausted that she was unable to drive the entire way home and had been pulling off the road to sleep before completing the commute back to her residence. Nonetheless, the employer refused to explore the possibility of transferring the complainant to the closer campus. Further, because her immune system was compromised and there was a “high potential for infection” caused by high patient traffic during the day shift, the employer should have granted her request to work night shifts until she completed her course of treatment.²⁴⁹

- e. Altering when, how or where an essential job function is performed
- f. Acquisition of tools, equipment, devices, furnishings, etc.

Example: In the example discussed above of the customer service representative who could no longer perform route deliveries, the employee argued that the employer should have accommodated him by providing carts and dollies to assist him with lifting. However, the evidence showed that the employee had undergone physical therapy and performed the exercises prescribed by his physician, but was nonetheless unable to lift and grab objects with his right hand on a consistent basis. Therefore, he was unable to perform the essential functions of the position of customer service representative even with the requested accommodation and the employer did not violate the FEHA when it offered him an available alternative position for which he was qualified.²⁵⁰

- g. Modification of tools, equipment, devices, furnishings, etc.
- h. Adjustment or modification of examinations
- i. Adjustment or modification of training materials
- j. Adjustment or modification of workplace policies, procedures or regulations, including adjustments to a policy governing leaves of absence

²⁴⁹ *Valente-Hook v. Eastern Plumas Health Care* (2005) 368 F.Supp.2d 1084.

²⁵⁰ *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828.

Example: An employer has a policy of assigning parking spaces nearest the worksite to employees on the basis of seniority. The employer may be required to alter its existing policy in order to provide a parking place near the worksite entrance to an employee with a disability who cannot park in a more remote location and walk to the entrance.

Example: A company providing outsourced customer service had a policy of not assigning work stations to its customer service representatives. Rather, upon arrival at the workplace, each employee was required to navigate crowded rows of cubicles to find an available work station and head set before clocking in and beginning work. The complainant was born with a congenital degenerative bone disorder (“brittle bones”). He utilized a wheelchair. The company terminated his employment on the ground that he was excessively tardy because of his pattern of beginning work late in the mornings, as well as returning late from his allotted 30-minute lunch break.

The evidence showed that the employer was aware of the employee’s disability and failed to modify its workplace policies as a form of reasonable accommodation which would enable him to perform the essential functions of his position. There were only two parking spaces in the employee parking lot designated for use by persons with disabilities, both of which were usually occupied by the time he arrived for work each morning, causing him to have to maneuver his wheelchair great distances to the worksite. Moreover, because of the complainant’s limited mobility, it was virtually impossible for him to use the bathroom, purchase and eat his meal, and return to work within the 30-minute lunch period. The employer should have modified its workplace policies to allow the employee a few extra minutes to return from lunch and breaks, and granted him an assigned work station and parking place.²⁵¹

Example: An employee needs to be absent from his/her duties in order to obtain treatment. The employer’s workplace policy prohibits the use of accrued vacation time for such purpose. It may constitute a reasonable accommodation for the employer to alter its existing policy and allow the employee with a disability to utilize accrued vacation credits in order that the leave not be unpaid.

²⁵¹ *EEOC v. Convergys Customer Management Group* (Mo. 2006), discussed at <http://www.kansascity.com/mld/kansascity/news/local/14346353.htm> and http://www.findarticles.com/p/articles/mi_qn4181/is_20060508/ai_n16351317.

*Example: An employer has a policy providing two weeks of annual paid vacation leave for all employees, no paid sick leave, and a “no leave” policy for the first six months of employment. If an employee requests, within the first six months of his/her employment, leave as a reasonable accommodation for a physical or mental disability, the employer must modify its policy and grant the employee’s request for leave unless the employer can demonstrate that to do so would constitute an undue hardship.*²⁵²

k. Leave of absence

Example: In the example discussed above of the licensed vocational nurse who was diagnosed with and underwent treatment for breast cancer, her employer had a policy of providing its employees a four-month medical leave of absence during which the employee’s job classification and pay rate were held and the employee continued to receive all insurance benefits. The employer also had a policy of providing personal leaves of absence, at the discretion of the Chief Executive Office, for up to four months with a continuation of all insurance benefits. The policy further provided that if the employee returned to work within 12 months of separation from employment, the employee would be given credit for prior seniority but not guaranteed a return to the same position or rate of pay. After the complainant exhausted her medical leave, she was still unable to return to work and asked that her leave be extended until such time as she completed chemotherapy. Her request was denied, with the employer’s Personnel Coordinator advising complainant that she would have to return to work at the expiration of her medical leave or be removed from the payroll. She was not offered a personal leave of absence as a reasonable accommodation of her disability, even if complainant did not specifically request additional leave.

*The employer may not place the entire burden upon the employee to identify and request a reasonable accommodation since the employer has superior knowledge of the workplace. A leave of absence for medical treatment may constitute a reasonable accommodation under the FEHA. There was no evidence that a personal leave of absence would have constituted an undue hardship upon the employer; rather, the Personnel Coordinator simply did not consider offering the complainant a personal leave. The employer violated the FEHA.*²⁵³

²⁵² T.A.M. at VII-10-11.

²⁵³ *Valente-Hook v. Eastern Plumas Health Care* (2005) 368 F.Supp.2d 1084.

Example: In the case of the heavy equipment operator who had an epileptic seizure while driving a company pickup discussed above, the complainant's physicians recommended that he return to work following a "period of observation during which he could adjust to the change in his medication." There was no evidence adduced establishing that his seizures were under control and he was cleared by his physicians to resume his duties as of the date his employment was terminated. That fact does not negate the employer's affirmative obligation to engage in the interactive process to identify possible reasonable accommodation(s) including, but not limited to, a leave of absence until such time as the complainant could resume performing the essential functions of his position.

The complainant requested a temporary change in his duties, reassignment to a vacant position or that he be allowed to take a leave of absence (paid via his use of accumulated sick leave or unpaid). His physicians opined that he would be able to safely resume his duties after transitioning to a new medication plan. As to the complainant's request for leave, the courts have recognized that "unpaid medical leave may be a reasonable accommodation . . . Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." It is not necessary for the employee to show that the leave is "certain or even likely to be successful." If a temporary leave of absence, granted as a reasonable accommodation, offers the possibility that the employee will be able to return and perform his/her duties at the conclusion of the leave, the employer must grant the leave request absent a showing of undue hardship. The employer is not, however, required to grant leave of an indefinite or indeterminate duration.²⁵⁴

- I. Provision of a qualified reader
- m. Provision of a qualified interpreter
- n. Assignment to a new or different supervisor

No court has ruled that an employer must provide an employee with a new or different supervisor as a form of reasonable accommodation, although the FEHA would not prohibit an employer from voluntarily doing

²⁵⁴ *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078. (See also *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243. Whether a proposed medical leave constitutes a reasonable accommodation is a fact-specific inquiry, resolved only by consideration of factors unique to the employer in question. Relevant evidence includes but is not limited to the employer's policy (written or unwritten) and history of granting medical leaves to other employees.)

so. It may be necessary, however, for an employer to modify or revise the supervisory methods it employs.

*Example: A supervisor frequently schedules staff meetings with just one or two days' notice. An employee with a disability must attend physical therapy sessions on a regular basis. She has had to miss several meetings since the supervisor has scheduled them at a time that conflicts with her therapy sessions. She requests that her supervisor provide staff members four to five days' advance notice of meetings so that she can reschedule her therapy, if necessary, in order to attend the meeting. Unless the employer can demonstrate that the provision of such advance notice would impose an undue hardship, the supervisor must grant her request as a reasonable accommodation of the employee's disability.*²⁵⁵

o. Telecommuting or working from home

Whether or not a request from an employee with a disability to telecommute or work from home must be granted will depend upon whether the accommodation would be both effective and not impose an undue hardship upon the employer. Whether this form of accommodation is "effective" depends upon whether the essential functions of the employee's position can be performed at home.

Some jobs such as food server, cashier in a convenience store, etc., can only be performed at the work site, while positions such as telemarketer or proofreader may be more easily performed away from the employer's premises. Other considerations include the employer's ability to adequately supervise the employee and the employee's need for particular equipment or tools in order to perform the essential functions.²⁵⁶

Note: The number of potential reasonable accommodation(s) is *infinite* because the appropriate accommodation is based upon the needs of both the employee or job applicant and the employer, as discussed further below.

Example: In the case of the customer service representative who sought reasonable accommodation following an on-the-job injury to his right wrist, the court found that the employer had, in fact, already accommodated the employee in ways other than those he requested. The court noted that the employer allowed the employee to perform specials work only for a period of two months and then left him job open for a year in the hope that he would be able to resume work after

²⁵⁵ EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, p. 47.

²⁵⁶ *Id.* at 48-49.

*undergoing and recuperating from surgery. Additionally, as discussed above, the employer offered him the only available position for which he was qualified. Accordingly, the employer's actions satisfied its obligation to provide a reasonable accommodation to the employee.*²⁵⁷

2. When the Obligation to Provide Reasonable Accommodation Arises

The obligation to provide a reasonable accommodation begins during the pre-employment process and is applicable to job applicants, as well as employees. It includes such actions as providing a sign language interpreter for a hearing-impaired applicant during the employment interview or scheduling an employment interview in a wheelchair-accessible location.²⁵⁸

The obligation to provide a reasonable accommodation attaches to the employer when the employer or other covered entity becomes aware or gains knowledge of an individual's disability, as demonstrated by the use of the word "known" in Government Code section 12940, subdivision (m), and California Code of Regulations, title 2, section 7293.9.²⁵⁹

The employer may become aware of the employee or job applicant's need for a reasonable accommodation in any number of ways. For instance, the employee may request an accommodation or his/her supervisor may bring to the employer's attention the fact that the employee may need an accommodation after observing the employee experiencing difficulty performing his/her essential job functions. The employee is not required to expressly ask for an accommodation or specifically assert his/her rights under the FEHA or any other disability discrimination law. The employer's obligation arises as soon as it knows that the employee suffers from a disability or medical condition that causes some limitation(s) of major life activity/activities that might require the employer to grant the employee a reasonable accommodation.²⁶⁰

Irrespective of the manner in which the employer learns of the employee or applicant's need or possible need for an accommodation, it is *not* sufficient for

²⁵⁷ *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828.

²⁵⁸ Cal. Code Regs., tit. 2, § 7294.0, subd. (c).

²⁵⁹ See also *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935.

²⁶⁰ An employee must do more than indicate to his/her supervisor or manager that his/her job situation is stressful. If the conversation(s) is overly vague, the employer will not be deemed to have acquired knowledge of the employee's disability or need for reasonable accommodation and, accordingly, the obligation to engage in the interactive process will not attach. (*Arn v. News Media Group* (2006) 175 Fed.Appx. 844. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]) The burden is on DFEH, of course, to prove the essential elements of the prima facie case, including the employer's knowledge that the employee is a person with a disability in need of accommodation.

an employer to make reasonable "good faith" efforts to provide reasonable accommodation.²⁶¹ Nor is it appropriate for an employer to require an individual with a disability to take a leave of absence or accept forced retirement in lieu of the opportunity to continue working.²⁶²

But there is no obligation to provide a reasonable accommodation if it will alter the essential purpose of the job in question,²⁶³ nor should the reasonable accommodation supplant the need for the employee with a disability.²⁶⁴

Although an accommodation must provide the opportunity to achieve performance and benefits equal to those provided a similarly situated non-disabled employee, an accommodation need not have to provide exactly the same benefits or results.²⁶⁵ As noted above, it need not be the best accommodation or the accommodation ideally desired by the applicant or employee, as long as it is effective.²⁶⁶

Example: An employer provides an employee lunchroom with food and beverages on the second floor of a building that has no elevator. If it would be an undue hardship for the employer to install an elevator to make the room accessible to an employee who utilizes a wheelchair, the employer need not do so, but must provide a comparable lunchroom facility on the first floor which can be accessed by persons in wheelchairs. While the downstairs lunchroom does not need to be identical to the second floor version, it must offer food and beverages, as well as an opportunity for the employee with a disability to eat with his/her co-workers. (It would not be a reasonable accommodation to provide a space where the employee with a disability could eat alone.)²⁶⁷

The purpose of a reasonable accommodation is to remove barriers to employment related to an individual's disability and assist the employee in performing his/her job duties, not provide job modifications, equipment, etc., primarily for the employee's personal use.

Example: As a general proposition, an employer would not be required to provide eyeglasses for an employee with a visual impairment.

²⁶¹ *County of Fresno v. Fair Employment and Housing Commission* (1991) 226 Cal.App.3d, at p.1554, fn. 6.

²⁶² *Id.* at 1555; see also *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935.

²⁶³ *DFEH v. Southern Pacific Transportation Company* (1980) FEHC Dec. No. 80-33, at p. 10; *DFEH v. City of Anaheim, Police Department* (1982) FEHC Dec. No. 82-08, at p. 11.

²⁶⁴ *DFEH v. City of Anaheim Police Department* (1982) FEHC Dec. No. 82-08 at p. 11.

²⁶⁵ T.A.M. at III-4.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

However, if the employee must utilize special eyeglasses to see the display on a computer monitor in order to perform the essential functions of his/her position, the employer will be required, absent an applicable defense, to provide such eyeglasses. The fact that the employee may also obtain an incidental personal benefit, e.g., also using the eyeglasses to operate his/her home computer, does not obviate the employer's obligation to provide them.

Example: The carpeting in an office makes it impossible for an employee with a disability to navigate using his/her manual wheelchair. Absent a viable defense, the employer will be required to provide a reasonable accommodation. The employer will have the option of deciding which accommodation it wants to provide if several are available, but all would accomplish the purpose of the accommodation, i.e., allowing the employee to move freely about the office in order to perform the essential functions of his/her position. And the employee must accept such accommodation even if it is not the one he/she deems ideal. Thus, the employer might choose to remove or replace the carpet, place floor mats which do not interfere with the operation of the wheelchair on top of the carpet, or provide the employee with a different wheelchair.²⁶⁸

When deciding on an appropriate accommodation, the employer's focus must be on the abilities and limitations on major life activity/activities of the individual employee in question, not the nature of the disability itself. This is because not every person who has a particular disability will experience the same type or extent of limitation(s). Therefore, the accommodation should be designed so as to allow the individual employee to perform the essential functions of the position, irrespective of how other similarly-disabled persons might be accommodated in order perform those functions.²⁶⁹ (See further discussion of the interactive process below.)

3. Reasonable Accommodation for Persons with Perceived Disabilities

If an employer perceives an employee or job applicant as being a person with a physical or mental disability, the employer must engage in an interactive process with that individual and provide him/her a reasonable accommodation unless legally excused from doing so. With regard to the right to receive a reasonable accommodation, the plain language of the FEHA, like ADA, does *not* distinguish between individuals who have an actual physical or mental disability and those who are perceived or "regarded as" a person with a disability.

²⁶⁸ *Id.* at III-5.

²⁶⁹ T.A.M. at III-7.

Moreover, under both State and federal law, employers are required to engage in an interactive process before implementing a reasonable accommodation. The exchange of information which takes place during the interactive process will, in most instances, reveal the true facts, i.e., that the employee is not a person with a disability and, accordingly, there is no need for accommodation.

Thus, the employer that fully complies with the duties imposed upon it by statute will benefit from its compliance by obtaining the information requisite to an informed, good faith decision about whether and how to provide reasonable accommodation for those employees who need it.

Example: In the case of the complainant who attended vocational rehabilitation training following an on-the-job injury, the employer withdrew its job offer based upon historical information contained in the complainant's file. The court found that the company admitted it perceived the employee to be a person with a physical disability, even though the employee contended that his medical issues were resolved and his physician had released him to return to work with no restrictions.

The public policies of the FEHA are served when it is liberally construed to provide the greatest possible protections to job applicants and employees. Therefore, reasonable accommodation must be granted to employees who are perceived by the employer as being persons with disabilities, whether or not that perception is accurate.

Because the employer perceived or "regarded" the employee as being a person with a disability, it was obligated to engage in a good faith interactive process to determine a reasonable accommodation could be provided to the employee.²⁷⁰

Example: The police officer who had a mental disability (major depression) that precluded him from carrying a weapon, requested that he be transferred to the radio room as a reasonable accommodation. The police department did not respond in any way to his request, failing to engage in the interactive process. The department defended on the ground that the officer could neither use nor be around/have access to firearms and, therefore, could not work in the radio room, even though its own examining physician made clear that the officer's limitation was not that extensive. (The department's own fitness for duty examiner opined that the officer could be around others with and have access to firearms.)

²⁷⁰ *Gelfo v. Lockheed Martin Corporation* (2006) 140 Cal.App.4th 34 [The court rejected the reasoning adopted by the Ninth Circuit Court of Appeals in *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226.]

In enacting ADA, Congress intended that “a person who [suffers an adverse employment action] because of the myths, fears and stereotypes associated with disabilities would be covered under the [statute], whether or not the employer’s perception was shared by others in the field and whether or not the person’s physical or mental condition would be considered a disability under the [statute].”

The court also rejected the “windfall” theory adopted by the Ninth Circuit, instead holding that the harm which befell the complainant was the type that civil rights statutes were designed to prevent. Because he was perceived by his employer as having more stringent limitations than his physician had actually outlined, he was denied the opportunity to return to work with a reasonable accommodation, i.e., transfer to a position for which he was qualified and able to perform. Had he not been incorrectly perceived as more limited in his abilities than he actually was, he would have been given the position he requested in the radio room.

Stated differently, a similarly situated employee who was not erroneously perceived as being limited in his/her major life activities would have been assigned to work in the radio room. Thus, the “employee whose limitations are perceived accurately gets to work, while [the complainant] is sent home unpaid. This is precisely the type of discrimination the ‘regarded as’ prong [of ADA] literally protects from, . . .”²⁷¹

Example: *In the case of the lock-and-dam operator who experienced a “personality conflict” with a co-worker, the complainant alleged that he was subjected to disability discrimination. Although the evidence showed that two of the complainant’s superiors “knew that he had been suffering from depression, both sa[id] that they did not consider him to be disabled.” Remarkably, the federal court discounted that evidence, concluding that employer’s decision-makers did not perceive the complainant as being a person with a disability.*

Applying California legal principles, DFEH’s investigation would require consideration of not just the decision-makers’ knowledge that the complainant was a person with a disability, but, in addition, whether or not and the extent to which that knowledge informed their decision-making. If the complainant’s actual or perceived disability was a motivating factor in the decision to take an adverse employment action against him, the FEHA would be violated.²⁷²

Example: *The complainant was employed for several months as a contracts clerk at a facility providing dialysis to renal patients when she began experiencing depression and anxiety. Following an “emotional*

²⁷¹ *Williams v. Philadelphia Housing Authority Police Department* (2004) 380 F.3d 751.

²⁷² *Greathouse v. Westfall* (2006) 2006 WL 3218557 (slip copy).

breakdown at work,” she was diagnosed with bipolar disorder, a fact that she revealed to her then-immediate supervisor and that individual’s successor, as well as her co-workers. She stated that she was “experiencing mood swings, which she was addressing with medications, and asked that they not be personally offended, if she was irritable or short with them.” As her symptoms worsened, she confided to a co-worker that her difficulty concentrating and balancing priorities was impacting her ability to perform her job duties.

Her supervisor convened a meeting attended by the complainant’s former supervisors and the supervisor of the unit to which the complainant was assigned for the purpose of delivery a written performance improvement plan to her. The first sentence of that document stated that her “attitude and general disposition are no longer acceptable . . .” The complainant began to cry, felt her face growing hot and tightening of her chest, and became short of breath. She threw the document across the room, yelled profanities and left the room, slamming the door behind her. She then kicked and threw things at her cubicle and attempted unsuccessfully to reach the psychiatric nurse practitioner from whom she had been receiving treatment. When she did speak with the nurse the following day, she was directed to immediately check into a hospital because she was experiencing suicidal ideations.

The employer provisionally designated her leave as CFRA-qualifying, but also commenced an investigation into the incident described above. One day later, the complainant’s supervisor and human resources “generalist” advised her via cell phone that her employment was being terminated.

In response, the complainant forwarded a letter three days later, explaining that her workplace behavior was “a consequence of her bipolar disorder and asking [the employer] to reconsider its decision to terminate her.” The employer refused and the complainant alleged she was subjected to discrimination.

The employer admitted that one of the factors in its decision to terminate the complainant’s employment was the fact that she “frightened her co-workers with her violent outbursts.” It was undisputed that the “violent outbursts” were related to the complainant’s mental disability, bipolar disorder. Not only had complainant revealed that fact to her superiors, she “kept them apprised of her medication issues and the various accommodations she thought might reduce the chances of an outburst at work.” The incident that prompted her hospitalization and termination occur while she was “in the throes of a medication change, which heightened the volatility of the mood swings that she and her health care providers were trying to get under control.” It was her disability-related

symptoms, not her work product, that motivated the employer to subject her to an adverse employment action, as expressed in the very first sentence of the employment improvement plan presented to her.

Accordingly, the complainant's behavior was a consequence of her disability. Conduct resulting from a disability "is part of the disability and not a separate basis for termination." The employer's behavior was unlawful.²⁷³

4. Affirmative Defense to a Claimed Failure to Provide Reasonable Accommodation: Undue Hardship

An employer's claim of "undue hardship" may only be raised as a defense to a failure to provide reasonable accommodation. An employer may be excused from the duty to accommodate if the employer can factually demonstrate that the proposed accommodation is not "reasonable" because it constitutes undue hardship and there are no alternative accommodations that would not impose such hardship.²⁷⁴

It should be noted, however, that the employer bears the burden of establishing the applicability of the defense by a preponderance of the evidence²⁷⁵ and it is a very high burden. The employer has an obligation to assess on a case-by-case basis whether an employee's request for reasonable accommodation would cause it to suffer an undue hardship.

Example: Recall the case of the police officer who was assigned to work at the department's front-desk for a period of six years until it was determined that his injuries were permanent such that he would never again be able to perform the essential functions of a patrol officer. The employee argued that once he demonstrated he was an individual with a disability who was able to perform the essential functions of the position to which he sought assignment as a reasonable accommodation, the burden was on the department to show that permanent assignment to the light-duty position would constitute an undue hardship. The court rejected the employee's argument. The question before the court was whether the accommodation requested was reasonable and, therefore, required under the FEHA. Because the court concluded that the accommodation request was not reasonable since it would have required the department to perform beyond its statutory obligation by creating a position specifically for the employee. Therefore, the question of whether or not such act would result in an undue hardship to the employer was not before the court, i.e., did not need to be answered.²⁷⁶

²⁷³ *Gambini v. Total Renal Care, Inc.* (2007) 2007 WL 686350.

²⁷⁴ T.A.M. at III-12.

²⁷⁵ Cal. Code Regs., tit. 2, § 7293.9.

²⁷⁶ *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1226-7.

In the same way that the FEHA protects persons with disabilities from employment decisions “based on stereotypes, fears, or misconceptions about disability . . .” a claim of undue hardship cannot be founded upon prejudice or fear that a reasonable accommodation may have a negative impact upon morale in the workplace, unless the accommodation would have an unduly disruptive impact upon the workplace and/or other employees’ ability to perform the essential functions of their jobs.

*Example: A female employee is undergoing chemotherapy following surgery for ovarian cancer. She gets fatigued and is unable to maintain her normal workload. In order for her to focus her energy upon the essential functions of her position, the employer temporarily distributes some of the marginal functions of her position to three other employees, one of whom is unhappy at being given additional work. However, in the employer’s estimation, the unhappy employee can easily absorb the new assignments with virtually no impact upon his ability to perform the essential functions of his position in a timely and efficient manner. There is no undue hardship because the reasonable accommodation does not result in significant disruption to the employer’s operation or the ability of other employees to complete their work. The employer can take appropriate action to address any morale or job satisfaction issues.*²⁷⁷

Providing a reasonable accommodation may impose an undue hardship upon an employer if it requires significant difficulty or expense. The analysis is conducted on a case-by-case basis, taking into account a number of factors including, but not limited to:²⁷⁸

- a. The nature and cost of the accommodation needed

The cost that is considered is the *actual* or *net* cost to the employer, taking into account items such as federal tax credits and deductions available, alternative sources of funding, etc.²⁷⁹

Example: A sales clerk for a fine clothing store has been diagnosed with bipolar disorder and prescribed a medication with the side effect of making his mouth extremely dry. He needs to drink a beverage approximately every 30 minutes in order to counteract that side effect. As a reasonable accommodation, the clerk requests that the store modify its policy prohibiting food or drink at the store’s check-out counters and he be permitted to keep a beverage there. Clerks are only allowed to leave the sales

²⁷⁷ EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, p. 57.

²⁷⁸ Cal. Code Regs., tit. 2, § 7293.9, subd. (b).

²⁷⁹ T.A.M. at III-13.

floor/check-out areas for two 15-minute breaks and their lunch period during each eight-hour shift.

The store argues that modification of the policy would impose an undue hardship upon it because of the chance that the clerk's beverage might spill and ruin store inventory (clothing) or damage expensive computer equipment located at each check-out area. Either situation might result in significant expense to the store. Moreover, if the store allowed one clerk to keep a beverage on the sales floor, all employees would want to follow suit, leading to accidents resulting in costly inventory losses and equipment damage. Lastly, the store argues that, in order to maintain a professional appearance and demeanor, the sales floor must remain free of food and beverages.

The store's arguments are not persuasive. First of all, there is no cost associated with a simple modification of the store's policy to allow the clerk to keep a beverage available when he needs it or briefly leave the sales floor, as necessary, to obtain a beverage. Moreover, absent evidence that the feared losses have occurred in the past and, therefore, can be quantified, the speculative nature of any financial impact upon the store cannot serve as a basis for denying the requested accommodation.²⁸⁰

Example: A job applicant is asked to appear for an in-person interview. At that time, the applicant indicates that he will need the services of a sign language interpreter in order to participate in the interview as a result of his disability (deafness). The hiring employer canceled the interview request and barred the applicant from continuing to participate in the selection process, asserting that having to provide a sign language interpreter would be so costly as to impose an undue hardship upon it. It is up to the prospective employer to produce sufficient evidence to prove that the cost of the sign language interpreter is significant enough to impose an undue hardship upon it.²⁸¹

- b. The overall financial resources of the facilities involved in providing the accommodation, the number of persons employed at the facility, and the effect on expenses and resources or impact of the accommodation upon the operation of the facility

Example: A crane operator for a construction company requests that he be allowed to begin his scheduled shift at 8:00 a.m. rather

²⁸⁰ EEOC Training Institute, Advanced Skills: Defenses – Participant's Manual, Undue Hardship, p. 8-5.

²⁸¹ *Id.* at p. 8-11.

than 7:00 a.m. due to his medication schedule. Three other employees start work at the same time that the crane operator does. The manager claims that allowing one employee to start work later than the other employees would impose an undue hardship upon the company because it would cause “down time” during which the other employees could not perform their work. The manager denies the request on the ground that “down time costs money.” The construction company bears the burden of establishing that the cost of “down time” is significant in relationship to the overall financial resources of the entity, number of persons employed, and the impact it would have upon the company’s operations.²⁸²

- c. The overall financial resources of the employer, overall size of the business with respect to the number of employees, and the number, type, and location of the employer’s facilities²⁸³

Example: An individual with muscular dystrophy is employed by a travel agency as a telephone operator. Her condition requires her to begin utilizing a wheelchair, but the travel agency premises are not accessible to persons in wheelchairs. Therefore, she requests that her employer move several room dividing walls (“cubicle” walls) in order to allow her to get to her work space. She also asks that the premises be modified to allow her to get into the employee break room which is up one flight of stairs. The building has no elevator.

The travel agency responds that it cannot modify the premises because it leases the office space from another company, i.e., it does not own the property. Therefore, the travel agency argues that it would impose an undue hardship upon it if it were required to make modifications to the property in order to grant the employee access.

The travel agency bears the burden of demonstrating that the cost of modifying the leased premises would be significant in light of its overall financial resources, size with respect of the number of employees, and the type and location of the physical facility. The terms of the lease agreement are also relevant. If the lease requires the travel agency to obtain the owner’s permission prior to modifying the premises, it must make a good faith effort to obtain the owner’s permission. If the owner’s permission cannot be

²⁸² *Id.* at p. 8-7.

²⁸³ Generally speaking, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer. (T.A.M. at III-12.)

*obtained, the travel agency must still engage in the interactive process with the employee to see if a reasonable accommodation short of making physical changes to the office can be achieved. Many leases provide that modifications to the property must be reversed at the end of the term of the lease, i.e., the premises must be restored to their original condition. The cost of restoration would, therefore, also be relevant in determining whether the accommodation would impose an undue hardship upon the travel agency.*²⁸⁴

- d. The type of operations, including the composition, structure, and functions of the employer's workforce

Example: *It might "fundamentally alter" the nature of a temporary construction site and/or be unduly costly to make it physically accessible to an employee using a wheelchair in light of the fact that the terrain and structures are constantly changing as construction progresses.*²⁸⁵

Example: *A local franchise of a national restaurant chain is independently owned and managed. It receives no funding from the national corporation. The local restaurant contends that it would pose an undue hardship for it to provide a sign language interpreter for weekly management meetings and, on that basis, rejects a deaf applicant for the position of Store Manager.*

*DFEH's investigation into a complaint should include exploration of the truth of the local restaurant's assertion that it receives no funding from the national corporation and assessment of the cost of the interpreter in light of the local restaurant's operations, staff, etc. However, if the local restaurant were actually part of a chain of restaurants owned and operated by the national corporation, the resources of that entity must be evaluated in order to determine whether the claim of undue hardship is sufficient to excuse the employer from providing a reasonable accommodation, i.e., sign language interpreter.*²⁸⁶

²⁸⁴ EEOC Training Institute, Advanced Skills: Defenses – Participant's Manual, Undue Hardship p. 8-11; EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act pp. 60-61. [Note: A failure by the building owner might constitute "interference" with the rights of the employee with the disability under ADA or other provisions set forth in ADA might require that the property owner make the modifications in order to assure that the property is accessible by persons with disabilities. Such inquiries are most likely beyond the scope of DFEH's investigation. Questions about an actual case which presents these or similar issues should be referred to DFEH's Legal Division.]

²⁸⁵ *Id.* at III-13.

²⁸⁶ *Id.* at III-14.

- e. The geographic separateness, administrative or fiscal relationship of the facility

Example: In the case concerning the registered nurse who was precluded from working 16-hour shifts in a correctional facility, the employer's argument that it could not limit her shifts to 12 hours as a reasonable accommodation because it would result in an undue hardship was unavailing. Specifically, the employer did not submit relevant evidence documenting the hardship such as its overall operating budget, budget for medical personnel, funds dedicated to the employment of registry nurses, or other evidence of the fiscal impact that the reasonable accommodation would have on its operation. Moreover, the director of nursing testified that temporarily limiting the overtime required of injured workers for periods of up to 120 days posed "little difficulty," thereby undercutting the employer's assertions.²⁸⁷

- f. The impact of the accommodation on the operation of the facility providing the accommodation

As discussed above, an employer is not required to alter the fundamental nature of its business or the services it provides in order to provide a reasonable accommodation.

Example: An individual with a visual impairment applies for a position as a cocktail server in a nightclub which maintains dim lighting as part of its overall ambience. The lights are completely dimmed during the nightly performance of the floor show. The applicant indicates that, as a reasonable accommodation, he/she will need bright lighting in order to safely move about in the club, take orders from customers, and serve food and drinks. The employer asserts that to accommodate the applicant would constitute an undue hardship because it would substantially alter the fundamental nature of its business, including the mood established by the lighting levels within the club and destroy its ability to provide basic services (floor shows) to its customers.²⁸⁸

Example: A customer service agent for an electronics manufacturer was required to be off work for 12 weeks during which he underwent surgery. He developed serious post-surgical complications and notified his employer that he would need to be off work for an additional eight to 12 weeks. He requested a medical leave of absence as a reasonable accommodation. His

²⁸⁷ *DFEH v. California Department of Corrections* (2003) FEHC Dec. No. 03-11 at p. 11-12.

²⁸⁸ T.A.M. at III-14.

supervisor denied his requested on the ground that the employee could “only give me an approximate date for his return to work and I cannot work with that. That would create an undue hardship on me and the company.”

The employer has the burden of showing that granting the additional leave without a fixed return date would constitute an undue hardship due to the disruption that results from the employee’s absence. Factors to be examined include the impact that the employee’s absence would have upon the operation of the business, including whether or not his duties could be performed by other employees, the cost, if any, of hiring temporary employee(s), whether temporary employees can be found who can perform the work adequately, etc.

*The employer has a right to require that the employee provide updated information while on leave about his/her condition and projected return date in order to allow the employer to plan and make staffing decisions.*²⁸⁹

Example: An experienced chef at a well-known and highly rated restaurant requests leave as a reasonable accommodation of his disability. He is unable to provide the restaurant with a projected date upon which he will be able to resume work.

The restaurant initially grants the chef’s request, but, after a period of time can demonstrate that it has lost customers and its income has dropped significantly due to the chef’s absence. The restaurant argues that, in the restaurant industry, being able to advertise that particular chef is cooking on a specific evening is crucial to attracting customers and temporary, less-well-known chefs simply cannot generate the same level of customer interest and business. Therefore, the restaurant contends that it must deny any further leave to the chef with the disability so that it can procure a permanent replacement.

*If the restaurant can meet its burden to show the loss of business, as evidenced by lower sales income, it may be able to establish that the chef’s ongoing leave constitutes an undue hardship because it alters the fundamental nature of the service being provided by the restaurant.*²⁹⁰

²⁸⁹ EEOC Training Institute, Advanced Skills: Defenses – Participant’s Manual, Undue Hardship p. 8-13; EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act p. 58.

²⁹⁰ EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act p. 59.

J. Affirmative Defenses Applicable to Claims of Disability Discrimination

The law provides that, under certain circumstances, an employer is not required to provide an accommodation.²⁹¹ Stated differently, the respondent may legally excuse its discriminatory actions if it can prove the existence and applicability of at least one of the affirmative defenses that may be recognized under the FEHA. The respondent bears the burden of producing sufficient evidence to demonstrate the applicability of the defense.

In evaluating whether an affirmative defense exists, an employer must conduct an individualized assessment of the employee or applicant's abilities or the individual risk to health and safety the applicant or employee's disability poses. An employer cannot, based upon employee's type of disability, make generalized or stereotypical assumptions about the employee's abilities.

1. Inability to Perform

In light of the California Supreme Court's decision in *Green v. State of California*, discussed above, the viability and formulation of this affirmative defense have been called into question.

As the dissenting justices observed, section 12940, subdivision (a)(1), does not impose liability upon an employer:

for firing or refusing to hire a disabled person who is unable, even with reasonable accommodations, to perform the essential duties of the position. In this case, for example, if because of his hepatitis C [the complainant] was unable to perform the essential duties of a stationary engineer at a State prison, defendant State of California did not violate [the] FEHA by terminating him because of his disability.

Section 12940, subdivision (a)(1), is set forth in the statute as an exception to the obligation to provide a reasonable accommodation. Under the law, the party seeking to invoke an exception usually bears the burden of proving the exception's applicability. Therefore, the dissent argued that the health and safety exceptions to the FEHA's prohibitions should continue to be "read both administratively and judicially as creating defenses, on which defendants bear the burden of proof."²⁹² The dissenting justices observed that the transformation of the inability-to-perform defense to an element of the prima facie case creates confusion.

²⁹¹ Gov. Code, § 12940, subd. (a)(1); Cal. Code Regs., tit. 2, §§ 7286.7, subds. (a) and (f), and 7293.8, subds. (a)-(d).

²⁹² *Green v. State of California* (2007) 42 Cal.4th 254, 270.

For DFEH's investigative purposes, the respondent will not be found, irrespective of whether or not the guiding principle is enunciated as an affirmative defense, to have violated the FEHA if, at the time that the complainant alleges he/she was subjected to adverse treatment, he/she was/is physically or mentally unable to perform the essential job functions of the position in question and no reasonable accommodation exists that would render the complainant able to perform the essential job functions.²⁹³ In other words, no violation of the FEHA occurs when an employer denies employment or an employment opportunity to an employee or job candidate with a disability who, even with an accommodation, cannot, because of his/her disability, perform the essential functions of the job.

The *Green* decision dictates that, at the outset, a determination must be made as to whether the applicant or employee is physically or mentally capable of performing the essential functions of the position. As discussed above, the essential job functions are those major, critical tasks of a particular job which an employee usually, but not always, spends the majority of his/her time performing. The essential functions of a position do not lend themselves to deletion, major revision, reassignment or reallocation because a change in the essential job functions would result in a change in the very purpose and nature of the job itself.

The employer's belief that the employee will be unable to perform at an unspecified future date and/or mere speculation about the complainant's inability to perform will not justify the employer's denial of employment or an employment opportunity.²⁹⁴

Example: The complainant was denied a permanent position as a truck driver after performing the duties of the position on a temporary basis for 19 months. A pre-employment physical examination revealed that the complainant suffered from scoliosis, a congenital defect of the spine (curvature, at which the employment offer was withdrawn in reliance upon the employer's policy of not hiring anyone with a back deficiency, even if presently not disabling. The evidence showed that the complainant had regularly performed equivalent duties for 10 years, held a job identical to that which he was offered for 19 months, and was, at the time of time, employed by another company that had full knowledge of his condition. He had never experienced a job-related back injury or problem. His physician stated that he could work without restrictions and he was not likely to suffer a "major" disability in the future. Two orthopedic specialists testifying on behalf of the trucking company opined that the complainant's risk of back injury was increased by his

²⁹³ Cal. Code Regs., tit. 2, § 7293.8, subd. (b).

²⁹⁴ Recall the facts of *DFEH v. Holmes Management, Inc. dba Cassidy's Family Restaurant* (2002) FEHC Dec. No. 02-08. The employer's speculation about the complainant's condition did not justify the adverse action taken against her.

*condition, but that not all persons with scoliosis would suffer injury and there was no statistical evidence available demonstrating the probability of injury. Both admitted that the complainant might never suffer any injury or problem if he was careful and remained physically fit. Such conjecture was ruled insufficient, by the court, to justify denying employment to the complainant.*²⁹⁵

Arguably, even in light of *Green*, the employer can rebut the prima facie showing of discrimination by introducing evidence that no reasonable accommodation exists or can be devised that would enable the complainant to perform the essential functions of the position. The facts must be evaluated on a case-by-case basis. Each proposed or suggested reasonable accommodation must be evaluated pursuant to the "undue hardship" standards discussed below.

Factors to be considered when determining the merits of this defense include, but are not limited to:

- a. Nature of the disability;
- b. Length of the training period relative to the length of time the employee is expected to be employed;
- c. Type of time commitment, if any, routinely required of all other employees for the job in question; and
- d. Normal workforce turnover.²⁹⁶

Example: *An employee had asthma which led to periodic "attacks" during which she experienced tightness in her chest, difficulty breathing, difficulty speaking, coughing and was sometimes unable to walk or engage in physical activity until her respiratory symptoms abated. She was hired as an administrative trainee. Her duties included answering telephones, typing invoices, faxing, assembling catalogs and filing. She informed the employer about her asthma during the job interview.*

The employer had a policy that no employee could be absent during the first six months of his/her employment. During that period, any "sick day(s)" would result in termination of employment. Specifically, the policy stated that "[t]ardiness or being absent in 1st 6 months not allowed, will be cause for termination."

Less than two weeks after commencing work, the employee suffered an asthma attack but still managed to report to work on time the next

²⁹⁵ *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791.

²⁹⁶ Cal. Code Regs., tit. 2, § 7293.8, subd. (f).

morning. She was, however, still experiencing symptoms from the night before. When the company president noticed she was having difficulty breathing and talking on the telephone, he directed her to take the remainder of the day off. She complied after being assured that she would not lose her job as a result of being absent.

Later that day, the sales manager called her at home and announced that he was terminating her employment because she had violated the six-month probationary period no-absenteeism rule, as well as her asthma. He stated that she was unable to perform the duties of her position and posed a danger to herself and others.

The FEHC found that the president's act of sending the employee home for the day could have constituted a reasonable accommodation of her physical disability, asthma, but for the reversal of that decision by the company's sales manager.

Moreover, the sales manager refused to consider varying the company's no-absenteeism policy as a reasonable accommodation and never engaged in an interactive process with the complainant to determine what accommodation might be needed in order for her to perform the essential functions of her position.

The FEHC specifically rejected the employer's "ability to perform" defense since the evidence showed that after complainant suffered an asthma attack, she was able to rest, take her prescribed medications, and resume work. Her physician testified that there was no medical reason why she could not return to her duties after her symptoms stabilized and, in fact, that "[t]he goal for treatment of asthma is to get the person back to normal lifestyle, so if they are adequately treated in spite of intermittent asthma attacks, their lifestyle . . . would be normal." The doctor also confirmed that the complainant posed no danger to herself or others.²⁹⁷

Example: In the case of the "packer" employed at the chocolate factory discussed above, the contention that the employer could have reasonably accommodated the employee by not requiring her to work on production lines where she was required to lift more than 20 pounds was rejected by the FEHC. The evidence showed that the employee would only be able to work on two or three of the company's many production lines, virtually all of which demanded lifting in excess of 20 pounds. Employees were rotated between production lines every day to prevent the same packers from always working on the more physically demanding line and avoid repetitive motion injuries, i.e., the very type of work-related injury that the employee had sustained, resulting in her

²⁹⁷ *DFEH v. Aldrich Supply Company, Inc.* (2003) FEHC Dec. No. 03-03.

disability. Additionally, the company did not operate every production line or the same production lines each day, depending on the company's inventory needs. The employer's ability to assign the employee to a work location each day would have been seriously restricted if she were precluded from working on each line. Thus, the FEHC concluded that assigning the employee only to production lines that did not require lifting in excess of 20 pounds "would supplant the essence of complainant's packing position." Lifting was deemed an essential function of the position – which the employee was unable to perform.²⁹⁸

Example: Complainant was employed as a registered nurse in a correctional facility. Nurses are assigned to medical clinics in each of the facility's "yards," a mental health crisis unit, emergency room and infirmary/skill nursing facility, both of which are open 24 hours per day, and a reception center. Complainant developed a physical disability (hip calcific bursitis) following a work-related injury. The applicable collective bargaining agreement stated that the employer could require nurses to work overtime, but did not specify the number hours that could be mandated. The agreement also specified that the employer would attempt to minimize the need for mandatory overtime through volunteer overtime, intermittent personnel, the use of nursing registries, and float pools. The employer also had a temporary modified duty policy under which employees could be limited to working eight-hour shifts. Modified duty of up to 120 days per year was allowed. Complainant asked for a reasonable accommodation in the form of modification of the facility's overtime policy, i.e., that she not be required more than 12 hours.

In response, the employer contended that it could not grant the accommodation because the ability to work 16-hour shifts was an essential job function. Having the complainant available for shifts lasting a maximum of 12 hours would pose an undue hardship since the facility had to operate 24 hours per day and had severe staffing shortages (about 1/3 of the desired workforce). Overtime had been "prevalent" in the months preceding complainant's request. If complainant could not work overtime, another nurse would have to provide coverage.

The employer successfully argued that the ability to work some overtime was an essential function. The need to provide medical services 24 hours per day required the presence of specialized, highly trained staff round-the-clock. The need to work overtime was documented in the employer's job descriptions, collective bargaining agreement, and testimony offered, including by complainant. That the facility was understaffed was not disputed.

²⁹⁸ DFEH v. Ghirardelli Chocolate Company (2003) FEHC Dec. No. 03-04.

*However, the employer did not sustain its burden to prove that the ability to work up to 16-hour shifts was an essential function of the position nor that the complainant could not perform the essential functions of the position even with an accommodation. On the contrary, the evidence showed that complainant had rarely been asked to work shifts of that duration prior to becoming disabled, and the employer did not present evidence demonstrating how often other nurses worked up to 16 hours. Additionally, the employer was able to use intermittent staff to cover those hours beyond the 12 that complainant was able to work.*²⁹⁹

2. Health or Safety of an Individual with a Disability

Even with the accommodation, the employee or job applicant cannot perform the essential functions of the job in a manner which would not endanger his/her health or safety because the job poses an imminent and substantial degree of risk to the employee or job applicant.

Stated differently, the employer's discriminatory action may be legally excused if the employer proves that the complainant's disability prevents him/her from performing the essential job duties over a reasonable length of time without facing identifiable, substantial and immediate danger to his/her own health and safety and no reasonable accommodation exists that would remove this danger.³⁰⁰

Speculative concerns about future injury to an applicant or employee are not legally sufficient to invoke this affirmative defense.³⁰¹ Similarly, an employer's economic concerns about increased insurance costs or workers' compensation costs are not affirmative defenses and will not excuse discriminatory acts taken against individuals with disabilities.³⁰² The determination must be based on valid, objective data rather than "stereotypes, patronizing assumptions about a person with a disability, or generalized fears about risks that might occur if an individual with a disability is placed in a certain job."³⁰³

²⁹⁹ *DFEH v. California Department of Corrections* (2003) FEHC Dec. No. 03-11.

³⁰⁰ Cal. Code Regs., tit. 2, § 7293.8, subd. (c).

³⁰¹ *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d at pp. 607-608; *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d at p. 799; *DFEH v. Interstate Brands Corporation* (1978) FEHC Dec. No. 78-05, at p. 16; *DFEH v. City and County of San Francisco* (1982) FEHC Dec. No. 82-25 at pp. 8-9; *DFEH v. City of San Jose and Civil Service Commission of San Jose* (1984) FEHC Dec. No. 84-18, at p. 15.

³⁰² *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d, at pp. 799-800; *DFEH v. City of San Jose and Civil Service Commission of San Jose* (1984) FEHC Dec. No. 84-18, at pp. 19-20.

³⁰³ T.A.M. at IV-14.

Example: The complainant was employed by a variety of maintenance contractors at an oil refinery. He was offered a job in the same unit but in the direct employ of the refinery, contingent upon passing a physical examination. The examination, conducted by the refinery's physician, revealed that the complainant's liver was releasing higher than normal levels of enzymes, causing the refinery to conclude that his "health might be at risk from exposure to chemicals . . . and rescinded its offer." The complainant continued working at the same job, but was employed by a contractor. When he consulted with his own physicians, he was diagnosed with asymptomatic, chronic active hepatitis C, but none of his doctors recommended that he stop working at the refinery.

Approximately three years later, the complainant was again offered a job working directly for the refinery. He underwent another physical examination which resulted in the job offer again being withdrawn. However, on this occasion, the refinery also asked the contractor to remove the complainant from his position in order to prevent him being exposed to solvents or chemicals. The complainant lost both his job and his medical insurance coverage.

The refinery defended its "common sense" assessment of the risk to the complainant, but the court found that there was a triable issue of fact as to whether or not the refinery could carry its burden to demonstrate that its decision was based upon "a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. (29 C.F.R. § 1630.2(r).)"³⁰⁴

The first part of this affirmative defense focuses on whether a danger to the individual with a disability would exist if he/she were to perform the essential job functions and the degree of that danger. The key concepts in this part of the legal standard are:

a. Identifiable

What kind of injury, if any, would occur if the complainant were to do the essential job functions?

Example: An employee with cerebral palsy has impaired manual dexterity of which the employer is aware. The employer may not automatically reject the individual for a job working in a laboratory handling glass beakers or vessels containing hazardous materials that can cause serious permanent injuries on the assumption that a

³⁰⁴ *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023. [Among the factors considered by the court were the qualifications of the physicians involved. The refinery's doctors had no special training in liver disease and were generalists, while the complainant's treating physicians were specialists in toxicology and liver disease.]

*person with impaired dexterity could not perform the essential functions of the position. The abilities of the individual employee must be considered and he/she given an opportunity to demonstrate how he/she could perform the essential functions of the position with or without reasonable accommodation. The specific limitation(s) of the individual in question will establish what type of injury, if any, he/she will sustain by performing the job functions.*³⁰⁵

b. Substantial

How serious or long-lasting would the injury be?

Example: *A firefighter who combats forest fires is diagnosed with diabetes. The condition can be controlled fairly well through a combination of testing blood sugar levels and medication (insulin). However, the employee's physician indicates that there is no guarantee that the employee won't suffer periodic episodes of blood sugar imbalance that might cause him/her to lose consciousness. An essential function of the position is the ability to work in remote, sometimes hilly areas with a partner for many hours at a time. If the firefighter loses consciousness under such circumstances, he poses a serious danger to himself (his condition could also be life-threatening to his partner; see further discussion below).*

c. Immediate

What is the time frame in which to expect any injury? Is the injury more probably than not going to happen tomorrow – or five years from now? The inquiry as to whether the complainant can perform the job over "a reasonable length of time" is relevant only where medical evidence shows that the complainant's condition will deteriorate over time.³⁰⁶

³⁰⁵ T.A.M. at IV-10.

³⁰⁶ *DFEH v. City of San Jose and Civil Service Commission of San Jose* (1984) FEHC Dec. No. 84-18, at pp. 15-16, fn. 7 [If the evidence clearly demonstrated that complainant's condition would certainly deteriorate in some substantial way and thus increase the risk to him, at some identifiable point in the future, to a level constituting 'danger' to his health, an inquiry whether it would be reasonable to require his employment in the interim might be relevant. But respondents did not prove that complainant's condition will deteriorate, and thus whatever risk he would face on his first day on the job is the same risk he would face throughout the five- or ten-year or other 'reasonable' periods respondents variously claimed. Since such risk did not at all constitute 'danger' to complainant and never will, the FEHC saw no need to inquire how long that risk would last.].

d. Probable (more likely than not)

Is there a probability, i.e., is it more likely than not, rather than a possibility that the complainant will sustain an injury or become disabled if he/she performs the job functions? What is the complainant's probability of injury as compared to that of a person who does not have a disability performing the same job?

[I]t is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his/her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time. "A reasonable length of time" is to be determined on an individual basis.³⁰⁷

Even if the employer demonstrates that the complainant would endanger his/her own health and safety by performing the essential job functions, the employer still bears the burden of proving that no reasonable accommodation exists that will alleviate that danger. The efficacy of the same type of accommodations discussed above must be evaluated and the same standards or factors used to evaluate whether or not accommodation would constitute an "undue hardship" must be applied.

Factors to be considered when determining the merits of this defense include, but are not limited to:³⁰⁸

- 1) Nature of the disability;
- 2) Length of the training period relative to the length of time the employee is expected to be employed;
- 3) Type of time commitment, if any, routinely required of all other employees for the job in question; and
- 4) Normal workforce turnover.

Note: DFEH staff must be aware of Government Code section 12940.1 referring to complainants with heart problems who seek employment as active firefighters or law enforcement officers:

³⁰⁷ Cal. Code Regs., tit. 2, § 7293.8, subd. (e).

³⁰⁸ *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d, at pp. 799-800; *DFEH v. City of San Jose and Civil Service Commission of San Jose* (1984) FEHC Dec. No. 84-18, at pp. 19-20.

. . . it shall be presumed that an individual with heart trouble, as referred to in Section 3212 of the Labor Code, applying for either a firefighter position or participation in an apprenticeship training program leading to employment in that position, where the actual duties require physical, active fire suppression, or a law enforcement position, the principal duties of which clearly consist of active law enforcement, could not perform his/her duties in a manner which would not endanger his/her health or safety or the health or safety of others. This presumption may be overcome by the applicant or the department proving, by a preponderance of the evidence, that the applicant would be able to safely perform the job. Law enforcement, for the purposes of this section, means police officer, deputy sheriff, or sheriff whose principal duties consist of active law enforcement service.

3. Health and Safety of Others

It is a permissible defense for an employer or other covered entity to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job.³⁰⁹

Stated differently, the employer must demonstrate that:

- a. The complainant cannot perform the essential job functions in a manner that would not endanger the health and safety of others to a significantly greater extent than if an individual without a disability performed the job; and
- b. No reasonable accommodation exists that would reduce the danger to that which is not significantly greater than if an individual without a disability performed the job.

The first part of the defense focuses on whether a danger to others (co-workers or the public) would exist if the complainant performed the essential job functions, what that degree of risk or injury would be, and whether that danger would be “significantly greater” than if a person without a disability performed the job.³¹⁰

³⁰⁹ Cal. Code Regs., tit. 2, § 7293.8, subd. (d).

³¹⁰ See *DFEH v. California State University - Sacramento* (1988) FEHC Dec. No. 88-08, at p. 18.

Like the “danger to self” defense, the risk or danger to others must be quantified and based on objective medical evidence, individualized to the complainant’s health condition and the particular job in question.

The same key words relevant to quantifying the degree of risk to others are identifiable, substantial, immediate and probable.

Whether or not a danger will qualify as “significantly greater” than the danger posed by a person who does not have a disability performing the same essential job functions will also depend on the individual facts of each case. It will involve a comparison of the specific nature of the danger created by the complainant with a disability to that created by a person who does not have a disability performing the same job.³¹¹

Even if the employer can demonstrate that the complainant will endanger the health and safety of others to a significantly greater extent than a person without a disability who performed the job, the employer must still prove by a preponderance of the evidence that no reasonable accommodation is possible that would reduce the level of “danger to others” that the employee presents.

The same types of accommodations and the same standards or criteria for evaluating reasonable accommodation and undue hardship outlined in connection with the “Inability to Perform” affirmative defense apply here. However, in this instance, the purpose of the accommodation is to assure that employee with a disability does not pose a significantly greater danger than would exist if a person without a disability performed the same essential job functions.

Example: United Parcel Service (UPS) requires its route drivers to pass its “Vision Protocol.” Specifically, drivers must have “some central vision and some peripheral vision in each eye.” The Vision Protocol is less rigorous than the vision standards imposed by the federal Department of Transportation (DOT). UPS defended its refusal to hire route drivers with monocular vision (vision in only one eye) on the ground that they could not perform the essential duties of the position of route driver in a manner that would not endanger the health and safety of others even with reasonable accommodation. Although the court made clear that every vision protocol established by an employer might not “pass muster,” the Vision Protocol enacted by UPS was based upon objective and statistical evidence that monocular drivers are involved in more accidents than binocular drivers, the risk of harm is high, and monocular drivers are not categorically barred from employment. Rather, each applicant is tested for compliance with specific criteria. Thus, UPS

³¹¹ *DFEH v. City of San Jose and Civil Service Commission* (1984) FEHC Dec. No. 84-14, at p. 17.

demonstrated that a failure to pass the Vision Protocol would “endanger the health and safety of others ‘to a greater extent than if an individual without a disability performed the job.’”³¹²

Example: *A police officer candidate was admitted to and completed the police department’s training academy course after a clerk input erroneous information into the department’s computer system indicating that he had passed the requisite medical examination. He had, in actuality, failed the examination due to a significant hearing impairment – almost total hearing loss in his left ear. After working for a few months as a probationary police officer, the candidate was assigned to a desk job and, five months later, his employment was terminated.*

The candidate alleged that the police department violated the FEHA by failing to provide him a reasonable accommodation and terminating his employment. The police department contended that the candidate should never have been admitted to the training academy – and would not have been absent a clerical error – because he was never qualified for the position of police officer. Therefore, the department argued that it was under no obligation to provide him an accommodation.

The evidence showed that the candidate’s hearing impairment caused him to fail the sound localization test. The ability to localize sound is “particularly significant to police officers in split second, life-threatening situations when an officer cannot clearly see.” Indeed, during the short time that the candidate worked as a patrol officer, his hearing impairment interfered with his ability to hear the radio, the Mobile Display Terminal, or his partner’s instructions, resulting in his initial two performance evaluations being unsatisfactory. The police department contended that he could endanger his co-workers and members of the public should he not hear a critical piece of information.

The court concluded that the police department did not violate the FEHA. It is within the discretion of a police department to set physical criteria for the hiring process and the candidate failed to meet that criteria. His hiring was due solely to an unfortunate clerical error which was corrected when discovered, i.e., his employment was appropriately terminated because he was never qualified for the position. Therefore, the candidate was not an employee hired by the employer who subsequently suffered an adverse employment action; rather, he was an individual who was never qualified to be hired from the outset. The court noted that the fact that the employee was a person with a disability was irrelevant, likening the situation to other scenarios under which an employer might ultimately learn that an employee is not qualified, e.g., it is discovered that the employee does not meet the employer’s

³¹² *E.E.O.C. v. United Parcel Service, Inc.* (9th Cir. 2005) 424 F.3d 1060.

*educational, citizenship or background (no criminal convictions) criteria. Under such conditions, the employer is not required to prove why it should not overlook or accommodate the employee's failure to meet its initial hiring prerequisites.*³¹³

Example: A police officer candidate underwent amputation of his left leg a few inches below the knee shortly after birth. When applying to be a police officer, he passed the department's written and essay tests, oral interview, physical abilities test, and psychological evaluation. He received a provisional offer of employment, contingent upon successful completion of a thorough medical evaluation. The department utilized the criteria set forth Medical Screening Manual of the State of California on Peace Officer Standards and Training (POST Commission) to evaluate candidates' fitness to serve as a police officer. On that basis, the department's physician opined that the candidate, although "well fitted prosthetically," would have difficulty performing some of the physical requirements of the position and could be "possibly hazardous to this individual should he be required to do it, particularly with speed."

In reliance upon that information, the department withdrew its conditional offer, notifying the candidate that it "is not possible to accommodate you within the specific job classification of 'Police Officer' . . . at this time." In other words, the department argued that it rejected the candidate because he could not perform the specific job duties of the position of police officer.

*The court ruled that the department did not violate the FEHA because the candidate bore the burden of proving that he was qualified to perform the position of police officer and he did not sustain that burden. The department was entitled to rely upon its expert's medical opinion because whether or not the candidate fell short of the physical qualifications of the job "is a matter solely to be determined by the police department itself."*³¹⁴

Example: A firefighter who had been employed in that capacity for approximately 18 months was injured in an off-duty motor vehicle accident which resulted in the amputation of his leg below the knee.

³¹³ *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472. The court also distinguished its ruling from that of *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, in which the employee challenged the employer's asserted BFOQ. In *Quinn*, the candidate did not argue that the sound localization test, on its face, violated the FEHA, and the court found that the test was reasonable in light of the public safety concerns associated with the duties of a police officer.

³¹⁴ *Christensen v. City of Los Angeles* (2002) 2002 WL 1154578. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

After he recuperated and was fitted with a prosthesis, he returned to a "desk job," an assignment that he reasonably believed would be temporary. When his physician opined that he was ready to return to active firefighting duty, he presented supporting medical documentation to his employer and requested that he be taken off light duty. The fire department refused to reinstate the employee to active duty or allow him to undergo a Field Performance Test (FPT) for the purpose of fairly and fully evaluating his abilities, even though its own examining physicians recommended that the test be administered. The complainant maintained that he was not a person with a disability but was perceived as such, citing to his ability to engage in vigorous physical activities, including but not limited to water skiing, hiking in mountainous terrain, sky diving, scuba diving, and swimming. He also acquired his helicopter pilot's license.

*DFEH argued that the employee was subjected to unlawful discrimination on the basis of actual or perceived physical disability based upon the fire department's denial of his request to participate in the department's FPT in order to demonstrate his fitness for duty and be restored to active firefighting duty with or without a reasonable accommodation.*³¹⁵

The factors to be considered when determining the merits of this defense include, but are not limited to:³¹⁶

- a. Nature of the disability;
- b. Length of the training period relative to the length of time the employee is expected to be employed;
- c. Type of time commitment, if any, routinely required of all other employees for the job in question; and
- d. Normal workforce turnover.

The "danger to others" affirmative defense includes the same exception regarding active law enforcement officers and firefighters as that which applies to the "danger to self" defense. (See Gov. Code, § 12940.1 and discussion above). A *rebuttable* presumption exists that complainants with heart problems are unable to perform the essential functions of active law enforcement and firefighting jobs without endangering the health of others to

³¹⁵ *DFEH v. Los Angeles City Fire Department* (2006) FEHC Dec. No. 06-08.

³¹⁶ *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d, at pp. 799-800; *DFEH v. City of San Jose and Civil Service Commission of San Jose* (1984) FEHC Dec. No. 84-18, at pp. 19-20.

a significantly greater extent than if an individual with a normal heart performed the job.

This is an evolving area of the law. Therefore, cases presenting these issues should always be discussed by DFEH investigative staff with a DFEH Legal Division Staff Counsel. Among the information which must be evaluated carefully are the standards, criteria or guidelines relied upon by the respondent in rejecting a candidate or employee, particularly any purported scientific studies or other empirical evidence suggesting that the candidate or employee poses a danger to him/herself or others.

4. Bona Fide Occupational Qualification (BFOQ)

The FEHA permits an employer to deny an employment benefit to an individual with a disability if the employer can prove that the individual fails to meet a "bona fide occupational qualification" (BFOQ).³¹⁷

A BFOQ is a categorical or general exclusionary policy that excludes an entire class of people from employment based on a particular characteristic.

*Example: A truck company had a policy that required all truck drivers to have a "normal" back. Under that exclusionary policy, the company would hire only drivers with "normal" backs and barred from employment all individuals with "abnormal backs." The employer maintained that a policy requiring all drivers to have a "normal" back (or the absence of an "abnormal back") was a BFOQ for the truck driving job. The "normal back" BFOQ was rejected by the court, however, which held that a common carrier must prove either that all or substantially all persons with the challenged characteristic cannot safely and efficiently perform the duties in question or that it is impossible or impracticable to deal with applicants on an individualized basis.*³¹⁸

An employer which bases its discriminatory conduct on a BFOQ must prove:

- a. That all or substantially all individuals in the class excluded by the requirement, e.g., those with "abnormal" backs would be unable to safely and efficiently perform the job in question; and
- b. That the exclusionary policy or mental or physical requirement is reasonably necessary to the essence of the respondent's business.³¹⁹

The first part of the BFOQ affirmative defense focuses on showing that an entire class of people (all those sharing the same physical or mental

³¹⁷ Gov. Code, § 12940, subd. (a).

³¹⁸ *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.3d at 799.

³¹⁹ Cal. Code Regs., tit. 2, § 7286.7, subd. (a).

characteristics) either can or cannot presently perform the job in question safely and efficiently. "All or substantially all" means that it is not enough to establish that some people cannot do the job. The respondent must produce evidence to meet the higher standard that "all or substantially all" persons who share the same disqualifying physical or mental characteristic cannot perform the job at all or are a danger to themselves or others.

There is no decision on point as yet quantifying "substantially all." The FEHC and courts have indicated that any BFOQ will be narrowly construed and scrutinized carefully.³²⁰ The facts must show that a very high percentage of people with the particular disability cannot perform the job or are a danger to themselves or to others. Thus, the BFOQ legal standard will be a very difficult one to meet.

One appellate court indicated that a less demanding standard for establishing a BFOQ defense applies to common carriers where the safety of passengers is at issue.³²¹ Thus, when a BFOQ defense is asserted in such cases, the court may employ a lower level of scrutiny.

The second component of the BFOQ affirmative defense requires that the exclusionary policy or physical or mental requirement be "reasonably necessary" to the "essence" or nature of the employer's business. "Reasonably necessary" means that the "essence" of the respondent's business, i.e., its essential purpose or principal function, would otherwise be undermined if the respondent did not have the exclusionary policy (BFOQ).³²²

If the employer fails to demonstrate that its BFOQ exclusionary policy is valid, it must still be given an opportunity to demonstrate, through one of the other three individual affirmative defenses, that the complainant is presently unable to perform the job, is a danger to him/herself, or is a danger to others, *even with* reasonable accommodation. However, the same limitations apply, i.e., "future risk" or fear of increased insurance or workers' compensation costs do not justify a BFOQ categorical exclusion.³²³

5. Otherwise Required by Law

"Notwithstanding a showing of discrimination, such an employment practice is lawful where required by State or federal law or where pursuant to an order of a State or federal court of proper jurisdiction."³²⁴

³²⁰ *Sterling Transit, Co. v. Fair Employment Practice Com* (1981) 121 Cal.3d at 797; *DFEH v. City of San Jose and Civil Service Commission of San Jose* (1984) FEHC Dec. No. 84-18, at p. 19, fn. 12.

³²¹ *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.3d at 799.

³²² Cal. Code Regs., tit. 2, § 7286.7, subd. (a).

³²³ *Sterling Transit, Co. v. Fair Employment Practice Com.* (1981) 121 Cal.3d, at 799.

³²⁴ Cal. Code Regs., tit. 2, § 7286.7, subd. (f).

In order to successfully assert this defense, the employer must prove that its otherwise discriminatory actions are required by a statute or court order that overrides the general disability prohibitions in the FEHA.

K. Failure to Take All Reasonable Steps Necessary to Prevent Discrimination and Harassment

The FEHA makes it unlawful “[f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”³²⁵ Moreover, when the complainant alleges that he/she was subjected to unlawful harassment, the covered entity may be liable if the evidence demonstrates that it failed to take “immediate and appropriate corrective action.”³²⁶

A failure to comply with Government Code section 12940, subdivision (k), constitutes a *separate, independent violation* of the FEHA. However,

“[t]here’s no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn’t happen, for not having a policy to prevent discrimination when no discrimination occurred . . .” Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented.³²⁷

Thus, unless it is shown that discrimination or harassment occurred, there can be no violation of subdivision (k).³²⁸

A covered entity will be found to have failed to take all reasonable steps necessary to prevent discrimination and/or harassment if it failed to have in place a workplace policy or guidelines prohibiting discrimination and/or harassment. Moreover, the policy drafted, adopted, and implemented by the covered entity must be disseminated to all employees.³²⁹

Any policy adopted must include adequate procedures for employees to utilize in order to lodge internal complaints about inappropriate workplace conduct, as well as directives to be followed by supervisors and managers who receive such complaints and/or otherwise become aware of inappropriate behaviors in the workplace. Effective policies will also contain an explanation of the consequences

³²⁵ Gov. Code, § 12940, subd. (k).

³²⁶ Gov. Code, § 12940, subd. (j)(1).

³²⁷ *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.

³²⁸ *Ibid.*

³²⁹ *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03 at p. 23-24.

which will follow from breaches thereof such as, for example, a system of progressive discipline flowing from repeated or egregious violations.³³⁰

Thus, investigations must explore whether or not the employer or other covered entity took all steps required under the law to prevent unlawful conduct in the workplace. The analysis should always encompass, but not be limited to:

1. Whether the covered entity drafted, adopted, implemented and disseminated a workplace policy prohibiting discrimination and/or harassment because of physical or mental disability or medical condition, and providing for appropriate consequences in the event of a violation of that policy;
2. Whether the covered entity's policy included an effective procedure for requesting reasonable accommodation(s) and a complaint procedure by which employees could voice their concerns about workplace discrimination and/or harassment to the employer and have their complaint handled in accordance with controlling law, i.e., immediately investigated by a neutral, impartial fact-finder;
3. Whether the employer promptly investigated complaint(s) of discrimination or harassment in accordance with its own policy and procedures (if any);
4. Whether the covered entity educated/trained its workforce, particularly supervisors and managers, about both employer and employee rights, obligations, and remedies set forth in the FEHA, including instructions on how to file an internal complaint with the entity, as well as how to reach DFEH and/or EEOC;
5. Whether the covered entity took any other steps to comply with its obligation to prevent and/or remedy discrimination and/or harassment.

L. Health Insurance and Other Employee Benefit Plans

The FEHA prohibits discrimination against individuals with disabilities "in terms, conditions, or privileges of employment."³³¹ As discussed above, "terms, conditions, or privileges" can include many aspects of the employment relationship, including but not limited to the provision of various types of insurance, particularly health insurance. The provisions set forth in some health insurance plans, particularly the exclusion of certain conditions or illnesses from coverage or failure to provide coverage for all available forms of treatment, may have an adverse impact upon persons with physical or mental disabilities or medical conditions, yet be lawful. Government Code section 12993, subdivision (b), specifically provides:

³³⁰ *Ibid.*

³³¹ Gov. Code, § 12940, subd. (a).

Nothing contained in [the FEHA] relating to discrimination in employment on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided the terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

That means that:

1. If an employer provides insurance or other benefit plans to its employees, it must provide the same coverage to employees with disabilities. In other words, employees with disabilities must have equal access to any insurance or benefit plans provided by the insurer.³³²
2. So long as an employee's disability or medical condition does not pose increased insurance risks, an employer cannot deny insurance to an individual with a disability or subject him/her to different terms or conditions of insurance solely because the individual has a disability.³³³
3. An employer may not refuse to hire or terminate the employment of an individual with a disability on the basis that the employer's current health insurance plan does not cover the individual's particular disability or because insuring the individual with a disability will cause the employer's future health care costs to increase.³³⁴
4. An employer may not refuse to hire or terminate the employment of an individual on the basis that the employee's family member or dependent has a disability that is not covered by the current health insurance plan or may cause the employer's future health care costs to increase.³³⁵

An employer may take no action related to the provision of health insurance or other employee benefit plans that constitute an attempt to evade, avoid, or circumvent the intent of and underlying public policies set forth in the FEHA.³³⁶ Therefore, subject to that proviso:

1. Employers may offer their employees health insurance plans that contain pre-existing condition exclusions, even if those exclusions adversely affect individuals with disabilities.³³⁷
2. Employers may offer their employees health insurance plans that limit coverage for certain procedures and/or limit particular treatments to a

³³² T.A.M. at VII-8.

³³³ *Ibid.*

³³⁴ *Id.* at VII-9.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ *Ibid.*

specified number per year, even if such limits/restrictions adversely affect individuals with disabilities, so long as the limits/restrictions are uniformly applied to all insured individuals irrespective of physical or mental disability or medical condition.³³⁸

Example: A teacher sued the school district by which he was employed, claiming that the district engaged in discrimination by providing a health insurance plan that covered many forms of infertility treatment, but specifically excluded in vitro fertilization (IVF) treatment. All employees and their dependents were covered under the same terms and conditions irrespective of physical or mental disability or medical condition. Therefore, IVF treatment was excluded from coverage for all employees.

The court found that no violation of the FEHA occurred, noting that EEOC takes the position that broad distinctions in the coverage provided by various plans for differing conditions and treatments “which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate ADA.” The discrimination about which the teacher complained was not genuinely based on infertility because the health plan covered many forms of infertility treatment. “The discrimination at issue is only suffered by individuals, like [complainant] and his wife, who experience types of infertility not responsive to forms of treatment covered by the [plan] and are treatable only through IVF, a particularly expensive form of treatment ordinarily utilized only when other treatments for infertility have failed. [Cite omitted.] As EEOC explains, a distinction that has a greater adverse impact on disabled individuals who require a particular form of treatment but not other disabled persons does not discriminate on the basis of disability within the meaning of ADA. If ADA and the FEHA prohibited the treatment-based distinction [complainant] challenges, the statutes would constitute not just shields against disability discrimination but swords mandating comprehensive healthcare coverage for all job-related disabilities, because that is the only form of coverage that does not discriminate on the basis of treatment. This is not what the FEHA was designed to accomplish.” There is no discrimination where, as in this case, an insurance exclusion applies uniformly to all covered persons, i.e., disabled individuals are given the same opportunity as everyone else. Insurance distinctions that apply equally to all employees are not discriminatory.³³⁹

³³⁸ *Id.* at VII-9-10.

³³⁹ *Knight v. Hayward Unified School Dist* (2005) 132 Cal.App.4th 121.

*Example: An employer may offer its employees a health insurance plan that limits the number of blood transfusions per year to five so long as the limit is applicable to all insured individuals. Even though an employee who has hemophilia and, therefore, is an individual with a disability within the meaning of the FEHA, requires more than five transfusions per year, he/she is not being subjected to discrimination because of his/her disability in the provision of insurance benefits.*³⁴⁰

3. Employers may offer health insurance plans that limit reimbursement for certain types of drugs or procedures, even if those limits adversely affect individuals with disabilities, so long as the limits are uniformly applied irrespective of physical or mental disability or medical condition.³⁴¹

*Example: An employer may offer its employees a health insurance plan that does not cover experimental drugs or procedures so long as the limit is applicable to all insured individuals.*³⁴²

³⁴⁰ TAM at VII-10.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

ANALYTICAL OUTLINE

I. Jurisdiction

Does DFEH have jurisdiction over the complaint and parties?³⁴³

II. Elements of the Prima Facie Case of Discrimination

- A. The complainant is a person with a physical or mental disability or medical condition as those terms are defined in Government Code section 12926, subdivisions (h), (i), and (k).
- B. The complainant was qualified for the position he/she sought or held, meaning that he/she was able to perform the essential functions of the job with or without reasonable accommodation.
- C. The respondent denied the complainant an employment opportunity, i.e., took an “adverse action” against the complainant by refusing to hire him/her, terminating his/her employment, etc.
- D. A “causal connection” exists between the complainant's disability or perceived disability and the denial of an employment opportunity. In other words, the decision was based, at least in part, on the complainant's disability, perceived disability, or medical condition.

III. Affirmative Defenses Applicable to Claims of Disability Discrimination

A. Inability to Perform

Can the respondent rebut the prima facie showing that the complainant was qualified for the position he/she sought or held, meaning that he/she was able to perform the essential functions of the job with or without reasonable accommodation, by demonstrating that no reasonable accommodation exists that will render the complainant able to perform the essential functions of the job in question?

B. Health or Safety of an Individual with a Disability

Can the respondent demonstrate that:

- 1. The complainant's disability prevents him/her from performing the essential functions of the job in a manner which would not endanger his/her health or safety because the job poses an imminent and substantial degree of risk to the complainant?

³⁴³ See Chapter entitled “Jurisdiction.”

Stated differently, can the employer prove that the complainant's disability prevents him/her from performing the essential job duties over a reasonable length of time without facing identifiable, substantial and immediate danger to his/her own health and safety? and

2. No reasonable accommodation exists that will make the danger to complainant's own health and safety not significantly greater than if an individual who does not have a physical or mental disability or medical condition performed the essential functions of the position in question?

Stated differently, can the respondent show that there is no reasonable accommodation it can grant the complainant that will make the danger to complainant not significantly greater than if an individual who does not have a physical or mental disability or medical condition performed the job in question?

C. Health and Safety of Others

Can the respondent demonstrate that:

1. The complainant cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job? and
2. No reasonable accommodation exists that would reduce the danger to that which is not significantly greater than if an individual without a disability performed the essential functions of the position in question?

Stated differently, can the respondent show that there is no reasonable accommodation it can grant the complainant that will make the danger to persons other than the complainant not significantly greater than if an individual who does not have a physical or mental disability or medical condition performed the job in question?

D. Bona Fide Occupational Qualification (BFOQ)

Can the respondent demonstrate that:

1. All or substantially all individuals in the class excluded by the requirement, i.e., those with the same physical or mental disability or medical condition as the complainant, would be unable to safely and efficiently perform the essential duties of the position in question? and

2. The exclusionary policy or mental or physical requirement is reasonably necessary to the essence of the respondent's business?

E. Otherwise Required by Law

Can the respondent demonstrate that it was required by a State or federal statute or valid order issued by a court of law to deny the employment opportunity to or take the adverse action against the complainant?

Stated differently, can the respondent show that its otherwise discriminatory actions are required by a statute or court order that overrides the FEHA's prohibitions on disability discrimination?

IV. Elements of the Prima Facie Case of Failure to Provide a Reasonable Accommodation

- A. Is the complainant a person with a physical or mental disability or medical condition as those terms are defined in the FEHA?
- B. Did the complainant request that his/her employer grant him/her a reasonable accommodation in order to perform the essential functions of his/her position?
or

Was the employer aware that the complainant required a reasonable accommodation because of his/her physical or mental disability or medical condition?

- C. Did the employer provide the complainant a reasonable accommodation?

V. Affirmative Defense Applicable to a Claim of Failure to Provide a Reasonable Accommodation?

Undue Hardship

Can the respondent demonstrate that:

At the time that the complainant requested a reasonable accommodation (or the employer became aware of the employee's need for reasonable accommodation), the employer was not legally required to provide the accommodation because to do so would cause the employer to suffer an undue hardship and there are no alternative accommodations that would not impose such hardship?

EXPLANATION OF ANALYTICAL OUTLINE

I. Jurisdiction

Does DFEH have jurisdiction over the complaint and parties?

II. Elements of the Prima Facie Case of Discrimination

A. Is the complainant a person with a physical or mental disability or medical condition as those terms are defined in the FEHA?

1. A physiological condition which:
 - a. Affects one or more bodily systems, and
 - b. Limits at least one major life activity
2. A mental or physiological condition that limits a major life activity
3. A physiological or mental/psychological condition not described above that requires special education or related services
4. A record or history of having a physical or mental disability as described above
5. Alcoholism so long as it:
 - a. Limits at least one major life activity, or
 - b. The complainant has a record or history of alcoholism
6. Drug addiction so long as:
 - a. The complainant is in recovery, i.e., has “achieved successful rehabilitation” through a supervised rehabilitation program or other means such that he/she is not currently using illegal substances or using legal substances in an illegal (abusive) manner, and
 - b. The addiction limits at least one major life activity
7. Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer, or
8. Genetic characteristics:
 - a. Genes and/or chromosomes which cause diseases or disorders in the carrier or his/her offspring, or
 - b. Inherited characteristics

Evidence to be gathered/analyzed includes, but is not limited to:

1. Complainant's medical records
2. Complainant's psychiatric or psychological records
3. Written statements prepared by the complainant
4. Written statements prepared by the respondent
5. Medical documentation, if any, relied upon by the respondent in making the decision to deny the complainant an opportunity or take adverse action against him/her.
6. Medical, psychiatric or psychological research, studies, tests, journal articles

Interviews to be conducted:

The health care providers who have treated the complainant and/or served as consultants regarding his/her condition/treatment should be interviewed. At a minimum, the following topics should be covered during the interview:

What is the health care provider's opinion on the issue of whether or not the complainant has a physical or mental disability or medical condition?

1. When did he/she form his/her opinion?
2. Upon what information (oral and documentary – from any source) did the health care provider rely in reaching his/her conclusion?
3. Did he/she examine the complainant? If so, how extensive was the examination? Are there written records of the examination and/or interview, e.g., medical history questionnaires, lab or examination results, x-rays, employment applications, correspondence? (Obtain all documents.)
4. What are the health care provider's credentials? Any biases revealed during the interview or in the written documents gathered and reviewed during the course of the investigation? (Note whether the health care provider practices a particular type of medicine exclusively, e.g., a physician that limits his/her practice to performing workers' compensation examinations on behalf of employer(s) may or may not exhibit a particular "mindset.")
5. What information, if any, did the health care provider communicate to the respondent? Orally or in writing? (Obtain all documents.)

Alternatively:

Was the complainant perceived by the respondent to be a person with a physical or mental disability or medical condition as those terms are defined in the FEHA?

A complainant can be perceived or “regarded as” being an individual with:

1. A physical disability
2. A mental disability
3. A history of having, or having had, a physiological condition that has no present disabling effect but may become a physical disability as defined in the FEHA
4. Alcoholism
5. Drug addiction

Evidence to be gathered/analyzed includes, but is not limited to:

1. Complainant’s medical records
2. Complainant’s psychiatric or psychological records
3. Written statements prepared by the complainant
4. Written statements prepared by the respondent
5. Medical documentation, if any, relied upon by the respondent in making the decision to deny the complainant an opportunity or take adverse action against him/her.
6. Medical, psychiatric or psychological research, studies, tests, journal articles

Interviews to be conducted:

The health care providers who have treated the complainant and/or served as consultants regarding his/her condition/treatment should be interviewed. At a minimum, the following topics should be covered during the interview:

What is the health care provider’s opinion on the issue of whether or not the complainant has a physical or mental disability or medical condition?

1. When did he/she form his/her opinion?
 2. Upon what information (oral and documentary – from any source) did the health care provider rely in reaching his/her conclusion?
 3. Did he/she examine the complainant? If so, how extensive was the examination? Are there written records of the examination and/or interview, e.g., medical history questionnaires, lab or examination results, x-rays, employment applications, correspondence? (Obtain all documents.)
 4. What are the health care provider's credentials? Any biases revealed during the interview or in the written documents gathered and reviewed during the course of the investigation? (Note whether the health care provider practices a particular type of medicine exclusively, e.g., a physician that limits his/her practice to performing workers' compensation examinations on behalf of employer(s) may or may not exhibit a particular "mindset.")
 5. What information, if any, did the health care provider communicate to the respondent? Orally or in writing? (Obtain all documents.)
- B. Was the complainant qualified for the position he/she sought or held, meaning that he/she was able to perform the essential functions of the position with or without reasonable accommodations?

Relevant questions to be answered include, but are not limited to:

1. What are the essential functions of the position in question?
2. What are the particular physical or mental requirements of the job in question, including the physical layout of the work station/environment?
3. Does the medical evidence (documentary and/or the opinion of complainant's treating physician) establish that the complainant was unable to perform the essential functions of the position at the time of the denial of the opportunity or adverse action?
4. Do the complainant's medical and work histories indicate that he/she was unable to perform the essential functions of the position in question?
5. Do the complainant's medical and work histories indicate that he/she is presently unable to perform the essential functions of the position in question?

6. Is the complainant presently performing or has he/she performed a job with the same or similar essential functions and/or physical or mental requirements?³⁴⁴
7. While employed in job(s) with the same or similar essential functions and/or physical or mental requirements, did the complainant develop absenteeism or experience any physical or mental problems that prevented him/her from performing the essential functions of the position in question?
8. In what type of sports or leisure activities does the complainant engage and what are the physical or mental requirements of those activities? How do they relate/compare to the essential functions of the position in question?
9. Does the respondent uniformly apply its workplace standards, guidelines, health and safety rules or regulations, etc., to all employees?
10. Has the respondent held other employees with the same mental or physical disability or medical condition, if any, to the same standard(s) as the complainant?
11. Has the respondent revised or modified its medical screening procedures recently? If so, has it screened its incumbent workforce to see if each employee meets its new standards(s)/guideline(s)?
12. Does the respondent have a policy of screening its workforce periodically to determine whether any employee has developed a disease, disorder or condition that does not comply with its medical standard(s)? If so, does the respondent comply with that policy?
13. What steps does the respondent take when it discovers that an incumbent employee has a disease, disorder or condition that does not comply with its medical standard(s)? For instance, does it provide reasonable accommodation to the employee on a temporary basis, permanently, or does it terminate the employee's employment?

Evidence to be gathered/analyzed includes, but is not limited to:

1. Job descriptions
2. Duty statements

³⁴⁴ A complainant's history of successfully performing the essential functions of the same or a similar position may be strong evidence that he/she was able to perform the position in question at the time of the denial of opportunity or adverse action.

3. Job function analyses
4. Complainant's medical records from all treating and consulting health care providers.
5. Medical information, if any, relied upon by the respondent in making the decision to deny the complainant an opportunity or take adverse action against him/her.

Interviews to be conducted:

Other employees or former employees with a physical or mental disability or medical condition.

Other employees or former employees, especially those in the same or similar job classification as the complainant and/or with the same physical or mental disability or medical condition (if known) should be interviewed to ascertain their experience with the respondent. At a minimum the following topics should be covered during the interview:

1. The employee's job history with the respondent, including but not limited to the length of his/her employment, position(s) held, duties performed, etc.
2. When did the respondent learn of the employee's physical or mental disability or medical condition, i.e., at the time of hiring or some later date? Upon learning of the employee's condition, did the respondent engage in the interactive process? Was the employee granted a reasonable accommodation and, if so, was it granted on a temporary or permanent basis?
3. Was the employee subjected to an adverse employment action? Was it because of his/her physical or mental disability or medical condition? If so, what action was taken and what rationale was provided by the respondent?
4. Whether the employee is aware of any other employee(s) with a physical or mental disability or medical condition.

Health care providers:

All of the health care providers who have treated the complainant and/or served as consultants regarding his/her condition/treatment should be interviewed. At a minimum, the following topics should be covered during the interview:

1. What is the health care provider's opinion on the issue of whether or not the complainant could perform the essential functions of the position in question at the time of the denial or other adverse employment action?
2. What is the health care provider's opinion on the issue of whether or not the complainant can presently perform the essential functions of the position in question?
3. When did he/she form his/her opinion?
4. Upon what information (oral and documentary – from any source) did the health care provider rely when making a determination that the complainant could or could not perform the essential functions of the position either at the time of the denial or other adverse employment action or presently?
5. For instance, did he/she have a copy of and review the relevant duty statement, job description, job analysis or other pertinent document(s) outlining the job requirements?
6. If he/she has not reviewed the relevant duty statement, job description, job analysis or other pertinent document(s), from what source(s) did the health care provider gain an understanding of the physical and/or mental requirements of the position in question?
7. Has he/she ever discussed the job requirements with the complainant and/or a representative of the respondent?
8. In forming his/her opinion, did he/she rely on any written or unwritten medical standard or policy, e.g., POST (Peace Officer Standards and Training) qualification standards?
9. Did he/she examine the complainant? If so, how extensive was the examination? Are there written records of the examination and/or interview, e.g., medical history questionnaires, lab or examination results, x-rays, employment applications, correspondence? (Obtain all documents.)
10. What are the health care provider's credentials? Any biases revealed during the interview or in the written documents gathered and reviewed during the course of the investigation? (Note whether the health care provider practices a particular type of medicine exclusively, e.g., a physician that limits his/her practice to performing workers' compensation examinations on behalf of employer(s) may or may not exhibit a particular "mindset.")

11. What information, if any, did the health care provider communicate to the respondent? Orally or in writing? (Obtain all documents.)

In evaluating medical evidence, always consider:

1. The testimony of a board certified specialist will usually carry more weight than that of a general practitioner.
2. Testimony and documentary evidence gathered from a health care provider who examined the complainant and was fully versed in the essential functions and physical or mental requirements of the position in question will be deemed more reliable and given greater weight than testimony from a health care provider who did not examine the complainant and/or was not fully versed in the essential functions and physical or mental requirements of the position in question.

Stated differently, the more speculative the physician's opinion, the less weight it will be given by a trier of fact.

- C. Did the respondent deny to the complainant an employment opportunity, i.e., did the respondent take an "adverse action" against the complainant such as refusing to hire him/her, terminating his/her employment, etc.?

Relevant questions to be answered/evidence to be gathered/analyzed:

Identify the specific act of harm in question. Then refer to and modify, as appropriate, the list of relevant questions presented in the Chapter entitled "Retaliation," and

- D. Does a "causal connection" exist between the complainant's disability or perceived disability and the denial of an employment opportunity?

In other words, was the employment decision based at least in part on the complainant's disability, perceived disability, or medical condition?

The evidence need not show that the complainant's disability or medical condition was the sole or even the dominant motivation for the adverse action. Rather, discrimination is established if a preponderance of the evidence indicates that the complainant's disability or medical condition was at least one of the factors that motivated the employer's action.

In most cases, the respondent admits the causal link by stating that it denied the opportunity or took the adverse action "because of" the complainant's disability or medical condition and asserts an affirmative defense. Thus, the investigative inquiries focus upon the sequence of events, identities and deliberations of decision-makers, etc.

III. Affirmative Defenses

To escape liability for its actions, a respondent may assert one or more of the five affirmative defenses discussed below. The respondent is only required to prove the applicability of one defense in order to justify its conduct.

A. Inability to Perform

Can the respondent rebut the prima facie showing that the complainant was qualified for the position he/she sought or held, meaning that he/she was able to perform the essential functions of the job with or without reasonable accommodation, by demonstrating that no reasonable accommodation exists that will render the complainant able to perform the essential functions of the job in question?

Relevant questions to be answered include, but are not limited to:

1. What are the essential functions of the position in question?
2. What are the particular physical or mental requirements of the job in question, including the physical layout of the work station/environment?
3. Does the medical evidence establish that the complainant was unable to perform the essential functions of the position at the time of the denial of the opportunity or adverse action?
4. What effort(s) did the respondent make to determine if a reasonable accommodation could be established? Stated differently, did the respondent and complainant engage in a timely, meaningful interactive process?
5. What form(s) of accommodation were considered and rejected? What reason(s) does the respondent assert for those form(s) of accommodation being rejected?

Evidence to be gathered/analyzed includes, but is not limited to:

1. Job descriptions
2. Duty Statements
3. Job function analyses
4. Complainant's medical records (see above)

5. Documentation pertaining to the interactive process, including but not limited to:
 - a. All written communication between respondent and complainant concerning the complainant's need for accommodation and the interactive process
 - b. Confirmation of all form(s) of accommodation(s) considered and rejected by respondent and/or complainant
 - c. The nature and cost of all form(s) of accommodation(s) considered and rejected by the respondent
 - d. The overall financial resources of the facilities involved in providing the accommodation
 - e. The number of individuals employed at the facility
 - f. The impact of the accommodation on the operation of the facility, or the impact of the expenses and resources
 - g. The overall financial resources of the respondent and overall size of the business in light of the number of employees, and number, type and location of its facilities
 - h. The type of operation maintained by the respondent entity, including the composition, structure and functions of the workforce
 - i. The geographic separateness and administrative or fiscal relationship of the facility or facilities.

B. Health or Safety of an Individual with a Disability

Can the respondent demonstrate the following:

1. The complainant's disability prevents him/her from performing the essential functions of the job in a manner which would not endanger his/her health or safety because the job poses an imminent and substantial degree of risk to the complainant?

Stated differently, can the employer prove that the complainant's disability prevents him/her from performing the essential job duties over a reasonable length of time without facing identifiable, substantial, immediate and probable danger to his/her own health and safety?

Relevant questions to be answered include, but are not limited to:

- a. Does the complainant's medical and work history indicate that he/she would more likely than not be in identifiable, substantial, immediate, and probable danger if he/she were to perform the essential functions of the position in question?
- b. Is the complainant presently performing or has he/she performed the same or similar job(s), i.e., positions with the same or similar

essential functions and physical or mental requirements? While performing those jobs, did he/she sustain any injuries, experience absenteeism or display or develop physical or mental problems?

- c. If not, does the complainant's performance history provide evidence that he/she would not be in identifiable, substantial, immediate and probable danger if he/she were to perform the essential functions of the position in question?
- d. In what type of sports or leisure activities does the complainant engage and what are the physical or mental requirements of those activities? How do they relate/compare to the essential functions of the position in question?
- e. Does the respondent uniformly apply its workplace standards, guidelines, health and safety rules or regulations, etc., to all employees? Stated differently, does the respondent hold other employees with the same mental or physical disability or medical condition to the same standard(s) as the complainant?
- f. Has the respondent revised or modified its medical screening procedures recently? If so, has it screened its incumbent workforce to see if each employee meets its new standards(s)/guideline(s)?
- g. Does the respondent screen its workforce periodically to determine whether any employee has developed a disease, disorder or condition that does not comply with its medical standard(s)?
- h. What steps does the respondent take when it discovers that an incumbent employee has a disease, disorder or condition that does not comply with its medical standard(s)? For instance, does it provide reasonable accommodation to the employee on a temporary basis, permanently or does it terminate the employee's employment?
- i. Does the respondent base its assertion that the complainant poses a danger to him/herself on any medical or industrial studies? (Obtain documents.) If so, do those studies demonstrate that the complainant cannot perform the essential functions of the position in question without endangering his/her own health and safety?³⁴⁵

³⁴⁵ As a general rule, the more specifically the study/studies address the complainant's physical or mental disability or medical condition and the position in question, the greater the evidentiary weight/value the study will be given.

Interviews to be conducted:

All of the health care providers who have treated the complainant and/or served as consultants regarding his/her condition should be interviewed. The following topics should be covered during the interview:

a. In the opinion(s) of the health care providers who have examined the complainant, would he/she be in imminent and substantial risk of danger if he/she were to perform the essential duties of the position in question?

b. Can the health care provider quantify the degree of risk to complainant?

1) Identifiable

What kind(s) of injury/injuries does the complainant risk by performing the essential functions of the position in question?

2) Substantial

How serious or long-lasting would the injury/injuries be?

3) Immediate

Within what time frame is injury to the complainant likely to occur?³⁴⁶

4) Probable

What is the probability of the complainant actually sustaining injury/injuries?

Is it "more likely than not" that he/she will sustain injury/injuries?

Is there a probability, as opposed to a possibility, that the complainant will sustain injury/injuries if he/she performs the essential functions of the position in question?

³⁴⁶ The question of whether the complainant can perform the essential functions of the position in question "over a reasonable length of time" is relevant only where medical evidence shows that the complainant's condition will deteriorate over time.

What is the probability of injury to complainant as compared to the risk to an individual who does not have a disability?

Evidence to be gathered/analyzed includes, but is not limited to:

- a. Job descriptions
 - b. Duty statements
 - c. Job function analyses
 - d. Complainant's medical records (see discussion above)
 - e. Employer's policies and procedures regarding medical screening/testing of job applicants and current employees
2. No reasonable accommodation exists that will make the danger to complainant's own health and safety not significantly greater than if an individual who does not have a physical or mental disability or mental condition performed the essential functions of the position in question?

Stated differently, can the respondent show that there is no reasonable accommodation it can grant the complainant that will make the danger to complainant not significantly greater than if an individual who does not have a physical or mental disability or medical condition performed the job in question?

Even if the respondent demonstrates that the complainant would be in identifiable, substantial, immediate and probable danger if he/she were to perform the essential functions of the position in question, the inquiry does not end there.

In order to successfully assert the affirmative defense, the respondent must also establish that no reasonable accommodation can be implemented that will alleviate the danger to the complainant.

The existence of a reasonable accommodation is evaluated by analyzing the same evidence discussed above with the only difference being that the reasonable accommodation sought in this instance is one which will eliminate the danger to the complainant if he/she performs the essential functions of the position in question.

C. Health and Safety of Others

Can the respondent demonstrate that:

1. The complainant cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job?

Relevant questions to be answered include, but are not limited to:

See above, and

2. No reasonable accommodation exists that would reduce the danger to that which is not significantly greater than if an individual without a disability performed the essential functions of the position in question?

Stated differently, can the respondent show that there is no reasonable accommodation it can grant the complainant that will make the danger to persons other than the complainant not significantly greater than if an individual who does not have a physical or mental disability or medical condition performed the job in question?

Even if the respondent demonstrates that the complainant would pose an identifiable, substantial, immediate and probable danger to other persons if he/she were to perform the essential functions of the position in question, the inquiry does not end there.

In order to successfully assert the affirmative defense, the respondent must also establish that no reasonable accommodation can be implemented that will alleviate the danger to other persons.

The existence of a reasonable accommodation is evaluated by analyzing the same evidence discussed above with the only difference being that the reasonable accommodation sought in this instance is one which will eliminate the danger to other persons if the complainant performs the essential functions of the position in question.

D. Bona Fide Occupational Qualification (BFOQ)

Can the respondent demonstrate that:

1. All or substantially all individuals in the class excluded by the requirement, i.e., those with the same physical or mental disability or medical condition as the complainant, would be unable to safely and efficiently perform the essential functions of the position in question?

Relevant questions to be answered include, but are not limited to:

- a. Does the respondent assert that all persons with the same physical or mental disability or medical condition as complainant cannot perform the essential functions of the position in question?

If so, the respondent must demonstrate that "all or substantially all" individuals, i.e., an entire class, cannot perform the essential functions of the position in question, or

- b. Does the respondent assert that all persons with the same physical or mental disability or medical condition as complainant who perform the essential duties of the position in question pose a danger to themselves and others?

If so, the respondent must establish that:

- 1) The entire class of individuals cannot perform the essential functions of the position in question without posing a danger to themselves, or
- 2) The entire class of individuals cannot perform the essential functions of the position without posing a danger to other persons.

- c. Did respondent's doctors rely on any medical or industrial studies when devising and implementing the medical standard at issue? (Obtain documents.)
- d. If so, what do the studies reveal about respondent's claim(s)?
- e. Do they address the complainant's particular disability or medical condition and/or the particular job in question?
- f. Does the complainant's medical and/or work history support the respondent's contention that he/she cannot safely and efficiently perform the essential duties of the position in question?
- g. Does the respondent uniformly apply its BFOQ? Stated differently, does the respondent uniformly reject for employment other potential employees with the same physical or mental disability or medical condition or terminate the employment of incumbent employees who develop the same physical or mental disability or medical condition?

Evidence to be gathered/reviewed includes, but is not limited to:

- a. Medical documentation, if any, demonstrating that all or substantially all persons in the class (with the same physical or mental disability or medical condition as complainant) are unable to perform the essential functions of the position in questions safely and efficiently (without posing a danger to him/herself or others).
 - b. Copies of any medical or industrial studies relied upon by respondent when devising and implementing the medical standard at issue, and
2. The exclusionary policy or mental or physical requirement is reasonably necessary to the essence of the respondent's business?

Even if the respondent demonstrates that all or substantially all individuals in the class excluded by the requirement (those with the same physical or mental disability or medical condition as complainant) would be unable to safely and efficiently perform the essential duties of the position in question, the inquiry does not stop there. The respondent must also demonstrate that the BFOQ is "reasonably necessary" to the essence of its business, i.e., that the "essence" (essential purpose or principal function) of the respondent's business would be undermined if the respondent did not enforce the exclusionary policy/BFOQ.

E. Otherwise Required by Law

Can the respondent demonstrate that it was required by a State or federal statute or valid order issued by a court of law to deny the employment opportunity to or take the adverse action against the complainant?

Stated differently, can the respondent show that its otherwise discriminatory actions are required by a statute or court order that overrides the FEHA's prohibitions on disability discrimination?

Evidence to be gathered/reviewed includes, but is not limited to:

1. The citation to the State or federal statute upon which respondent based its adverse action
2. A copy of the order issued by a court of law upon which respondent based its adverse action³⁴⁷

³⁴⁷ The law cited and documents produced by the respondent must be reviewed by DFEH's Legal Division which will provide an opinion as to the applicability of such law or court order to the particular facts of the complaint.

IV. Elements of the Prima Facie Case of Failure to Provide a Reasonable Accommodation

- A. Is the complainant a person with a physical or mental disability or medical condition as those terms are defined in the FEHA?³⁴⁸

Evidence to be gathered/analyzed includes, but is not limited to:

1. Complainant's medical records
2. Complainant's psychiatric or psychological records

- B. Did the complainant request that his/her employer grant him/her a reasonable accommodation in order to perform the essential functions of his/her position?

Relevant questions to be answered include, but are not limited to:

1. Did the complainant communicate a request(s) for reasonable accommodation to the respondent? By what means? On what date(s)?
2. Did the respondent acknowledge and respond to the complainant's (initial) request? By what means? On what date(s)?
3. What are the essential functions of the position in question?
4. What are the particularized physical or mental requirements of the job in question, including the physical layout of the work station/environment?
5. Does the medical evidence establish that the complainant was unable to perform the essential functions of the position without a reasonable accommodation? or

Was the employer aware that the complainant required a reasonable accommodation because of his/her physical or mental disability or medical condition?

Relevant questions to be answered include, but are not limited to:

1. How did the respondent become aware of the complainant's need for reasonable accommodation? On what date(s)?

³⁴⁸ Gov. Code, § 12926, subds. (h), (i), and (k).

2. Did the respondent acknowledge the complainant's need for reasonable accommodation? By what means? On what date(s)?
 3. What are the essential functions of the position in question?
 4. What are the particularized physical or mental requirements of the job in question, including the physical layout of the work station/environment?
 5. Does the medical evidence establish that the complainant was unable to perform the essential functions of the position without a reasonable accommodation?
- C. Did the employer provide the complainant a reasonable accommodation?

Relevant questions to be answered include, but are not limited to:

1. What effort(s) did the respondent make to determine if a reasonable accommodation could be established? Stated differently, did the respondent and complainant engage in a timely, meaningful interactive process?
2. What forms of accommodation were considered and rejected? What reasons does the respondent assert for those forms of accommodation being rejected?
3. Did the respondent grant an accommodation to the complainant? If so, what form of accommodation was offered? How was the offer(s) communicated to the complainant? On what date? Was any aspect of the offer conditional?
4. Did the complainant accept the accommodation? If not, why not?
5. Did the respondent deny an accommodation to the complainant? If so, what reason(s) did the respondent offer for the denial?

Evidence to be gathered/analyzed includes, but is not limited to:

1. Job descriptions
2. Duty statements
3. Job function analyses
4. Complainant's medical records from all treating and consulting health care providers.

5. Medical information, if any, relied upon by the respondent in making the decision to deny a reasonable accommodation to the complainant.

Interviews to be conducted:

Other employees or former employees with a physical or mental disability or medical condition.

Other employees or former employees, especially those in the same or similar job classification as the complainant and/or with the same physical or mental disability or medical condition (if known), should be interviewed to ascertain their experience with the respondent. At a minimum the following topics should be covered during the interview:

1. The employee's job history with the respondent, including but not limited to the length of his/her employment, position(s) held, duties performed, etc.
2. When did the respondent learn of the employee's physical or mental disability or medical condition, i.e., at the time of hiring or some later date?
3. Did the employee request a reasonable accommodation? Upon learning of the employee's condition or receipt of his/her request for accommodation, did the respondent and employee engage in a meaningful, timely interactive process?
4. Was the employee granted a reasonable accommodation and, if so, was it granted on a temporary or permanent basis?
5. Whether the employee is aware of any other employee(s) with a physical or mental disability or medical condition who have been granted or denied a reasonable accommodation.

Health care providers:

All of the health care providers who have treated the complainant and/or served as consultants regarding his/her condition/treatment should be interviewed. At a minimum, the following topics should be covered during the interview:

1. What is the health care provider's opinion on the issue of whether or not the complainant can perform the essential functions of the position in question with or without a reasonable accommodation?

2. When did he/she form his/her opinion?
3. Upon what information (oral and documentary – from any source) did the health care provider rely when making a determination that the complainant can or cannot perform the essential functions of the position with or without a reasonable accommodation?
4. For instance, did he/she have a copy of and review the relevant duty statement, job description, job analysis or other pertinent document(s) outlining the job requirements?
5. If he/she has not reviewed the relevant duty statement, job description, job analysis or other pertinent document(s), from what source(s) did the health care provider gain an understanding of the physical and/or mental requirements of the position in question?
6. Has he/she ever discussed the job requirements with the complainant and/or a representative of the respondent?
7. In forming his/her opinion, did he/she rely on any written or unwritten medical standard or policy, e.g., Police Officer Standards and Training (POST) qualification standards?
8. Did he/she examine the complainant? If so, how extensive was the examination? Are there written records of the examination and/or interview, e.g., medical history questionnaires, lab or examination results, x-rays, employment applications, correspondence? (Obtain all documents.)
9. What are the health care provider's credentials? Any biases revealed during the interview or in the written documents gathered and reviewed during the course of the investigation? (Note whether the health care provider practices a particular type of medicine exclusively, e.g., a physician that limits his/her practice to performing workers' compensation examinations on behalf of employer(s) may or may not exhibit a particular "mindset.")
10. What information, if any, did the health care provider communicate to the respondent? Orally or in writing? (Obtain all documents.)

In evaluating medical evidence, always consider:

1. The testimony of a board certified specialist will usually carry more weight than that of a general practitioner.

2. Testimony and documentary evidence gathered from a health care provider who examined testimony and documentary evidence gathered from a health care provider who examined the complainant and was fully versed in the essential functions and physical or mental requirements of the position in question will be deemed more reliable and given greater weight than testimony from a health care provider who did not examine the complainant and/or was not fully versed in the essential functions and physical or mental requirements of the position in question. Stated differently, the more speculative the physician's opinion, the less weight it will be given by a trier of fact.

V. Affirmative Defense Applicable to a Claim of Failure to Provide a Reasonable Accommodation?

Undue Hardship

Can the respondent demonstrate that:

At the time that the complainant requested a reasonable accommodation (or the employer became aware of the employee's need for reasonable accommodation), the employee was not legally required to provide the accommodation because to do so would cause the employer to suffer an undue hardship and there are no alternative accommodations that would not impose such hardship?

Relevant questions to be answered include, but are not limited to:

- A. What is the nature of the accommodation needed?
- B. What is the cost of the accommodation needed?
- C. In what type of operation is the respondent engaged?
- D. What is the composition and structure, and what are the functions of the employer's workforce?
- E. What are the overall financial resources of the employer?
- F. What is the overall size of the business with respect to the number of employees, and the number, type and location of the employer's facilities?
- G. Is there a geographic separateness of the facility where the complainant is assigned to work and the accommodation will be granted in relationship to the employer as a whole?

- H. Is there an administrative or fiscal relationship between the facility where the complainant is assigned to work and the accommodation will be granted in relationship to the employer as a whole?
- I. What are the overall financial resources of the facilities involved in providing the accommodation?
- J. How many persons are employed at the facility?
- K. What impact, if any, would providing the reasonable accommodation to the complainant have upon the expenses and resources of the facility? Stated differently, what impact, if any, would granting the accommodation to the complainant have upon the operation of the facility?
- L. Would granting the accommodation to complainant have an unduly disruptive impact upon the workplace and/or other employees' ability to perform the essential functions of their jobs?

Evidence to be gathered/analyzed includes, but is not limited to:

- A. Respondent's personnel records verifying the number and assigned work location of its workforce
- B. Respondent's financial records, e.g., profit and loss statements, balance sheet
- C. Respondent's organizational chart
- D. Documentation detailing the nature of respondent's operation, e.g., advertising brochures, pamphlets, etc.

The burden to demonstrate that granting the complainant a reasonable accommodation would impose an undue hardship upon the respondent is extremely high and onerous. Therefore, DFEH staff should discuss the evidence to be gathered and analyzed with a DFEH Legal Division Staff Counsel as soon as the respondent communicates its intent to assert the defense of undue hardship.